No. 06-6911

Title: James D. Logan, Petitioner

v.

United States

Docketed: October 3, 2006

Lower Ct: United States Court of Appeals for the Seventh Circuit

Case Nos.: (05-4722)

Decision Date: July 6, 2006

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 29 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 2, 2006)
Oct 26 2006	Order extending time to file response to petition to and including December 4, 2006.
Nov 28 2006	Order further extending time to file response to petition to and including January 3, 2007.
Jan 3 2007	Brief of respondent United States in opposition filed.
Jan 18 2007	DISTRIBUTED for Conference of February 16, 2007.
Feb 20 2007	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Mar 26 2007	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 7, 2007.
Apr 26 2007	The time for filing the joint appendix and petitioner's brief on the merits is further extended to and including May 25, 2007.
May 23 2007	The time to file respondent's brief on the merits is extended to and including July 30, 2007.
May 24 2007	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
May 25 2007	Brief amicus curiae of National Rifle Association of America, Inc. filed.
May 25 2007	Joint appendix filed. Statement of cost for printing the joint appendix received pursuant to Rule 26.
May 25 2007	Brief of petitioner James D. Logan filed.
May 30 2007	LODGING consisting of 40 bound copies of Summary and Charts received from counsel for amici NACDL, et al.
Jul 30 2007	Brief of respondent United States filed.
Aug 25 2007	CIRCULATED.
Aug 30 2007	SET FOR ARGUMENT Tuesday, October 30, 2007.
Aug 31 2007	Reply of petitioner James D. Logan filed.
Sep 11 2007	Record received from U.S.C.A. for 7th Circuit. (1 envelope)

Sep 14 2007	Record received from U.S.D. C. for Western District of Wisconsin. (1 envelope) This record contains sealed documents.
Oct 30 2007	Argued. For petitioner: Richard A . Coad, Madison, Wis. For respondent: Daryl Joseffer, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

No. 06-6411

9-29-2006

IN THE SUPREME COURT OF THE UNITED STATES

JAMES D. LOGAN, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the "civil rights restored" provision of 18 U.S.C. § 921(a)(20) applies to a conviction for which a defendant was not deprived of his civil rights thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, James D. Logan, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix A to the Petition and is reported at 453 F.3d 804.

The decision of the United States District Court for the Western District of Wisconsin appears at Appendix B to the Petition and was not reported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit decided Petitioner's case on July 6, 2006. Neither party filed a petition for rehearing in the court of appeals. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND SENTENCING GUIDELINES INVOLVED

18 U.S.C. § 921(a)(20) provides:

The term "crime punishable by imprisonment for a term exceeding one year" does not include-

> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 924(e)(1) provides:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .

STATEMENT OF THE CASE

On June 22, 2005, a grand jury sitting in the Western District of Wisconsin returned a one-count indictment against James Logan that alleged possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). The charge was based on evidence obtained on May 31, 2005, when law enforcement officers responded to a call at a residence in Janesville, Wisconsin.

Pursuant to a plea agreement, Logan pleaded guilty to the one-count indictment on September 28, 2005. The plea agreement set forth the maximum penalty of imprisonment at ten years, and made no mention of the penalty provisions under 18 U.S.C. § 924(e)(1). The district court accepted Logan's plea of guilty conditioned upon the preparation of the presentence report ("PSR").

The PSR indicated that Logan may qualify as an armed career criminal and for enhanced penalties under 18 U.S.C. § 924(e)(1). An addendum to the PSR set out the convictions which would qualify Logan as an armed career criminal. Three prior convictions formed the basis for the PSR's suggestion and the government's argument that Logan was an armed career criminal. On December 14, 1988, Logan was convicted of misdemeanor battery as a repeater under Wis. Stat. §§ 940.19(1) and 939.62(1)(a). On February 15, 1988, Logan was convicted of misdemeanor battery

as a repeater under Wis. Stat. §§ 940.19(1) and 939.62(1)(a). On March 6, 2001, Logan was convicted of misdemeanor battery as a repeater under Wis. Stat. §§ 940.19(1) and 939.62(1)(a). Logan objected to each paragraph containing a supposed predicate conviction, arguing that none of the convictions qualified Logan for enhanced penalties under 18 U.S.C. § 924(e)(1).

At the December 7, 2005 sentencing hearing, the district court judge rejected the plea agreement which contained the ten-year maximum penalty because it did not adequately represent the defendant's criminal conduct, that is, the criminal conduct to which the Court believes it should have the opportunity to address.

Logan persisted with his plea of guilty, and a second sentencing hearing was scheduled for December 16, 2005. No plea agreement was reached. At the December 16, 2005 sentencing hearing, the district court found that Logan was an Armed Career Criminal and imposed the mandatory minimum penalty of 180 months as required by 18 U.S.C. § 924(e)(1).

On appeal, Logan argued that his three misdemeanor battery convictions punishable by three years imprisonment do not qualify as predicates for the sentencing enhancement under 18 U.S.C. §924(e)(1). Logan argued that because § 921(a)(20) excludes from the definition of "conviction" any offense that "has been expunged, or

set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms" and his three prior convictions counted by the district court as predicates did not result in the loss of his civil rights, then those convictions should be treated the same as a conviction for which civil rights were lost and later restored.

The court of appeals held that "[t]he word 'restore' means to give back something that had been taken away," and that "the 'restoration' of a thing never lost or diminished is a definitional impossibility." *United States v. Logan*, 453 F.3d 804, 805 (7th Cir. 2006) (quotations omitted). Consequently, it followed the rational of *McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995) that civil rights that have not been taken away cannot be restored, and upheld Logan's 180-month sentence as an armed career criminal.

REASONS FOR GRANTING THE WRIT

I. Overview.

In order to qualify for enhanced penalties under § 924(e)(1), a defendant convicted of violating § 922(g)(1) must have three previous convictions for a violent felony or a serious drug offense. *See* 18 U.S.C. § 924(e)(1). A violent felony is a

crime punishable by imprisonment for a term exceeding one year that has as an element "the use, attempted use, or threatened use of physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). The term, "crime punishable by imprisonment for a term exceeding one year" does not include misdemeanors punishable by a term of imprisonment of two years or less, nor does a conviction count which "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such . . . restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."[1] *See* 18 U.S.C. § 921(a)(20). Conversely, the restoration provision in § 921(a)(33)(B)(ii), which is relevant to convictions for individuals in possession of a firearm after conviction for a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9), only applies to "civil rights [that have been] restored (if the law of applicable jurisdiction provides for the loss of civil rights under such an offense)."

The ordinary reading of the "restored" provision would seem not to apply to Logan because his civil rights were never taken away in the first place. Section 921(a)(20) is clear that it includes individuals whose civil rights have been taken away

---

[1]Although Congress has not defined "civil rights," a defendant's "civil rights" are widely accepted to include that person's right to vote, hold public office, and the right to serve on a jury. *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990).

and then later restored. But it is unclear, by the plain meaning of the provision, as to whether Congress intended to treat differently those individuals convicted of misdemeanors who never had their civil rights taken away.

II. Conflict Between Court of Appeals Decision And Established Supreme Court Precedent.

There is a circuit split on the issue of the application of the Armed Career Criminal Act with regard to misdemeanants who have never had their civil rights taken away, with the circuits falling into one of two camps: those that follow *United States v. Indelicato*, 97 F.3d 627 (1st Cir. 1996) and those that follow *McGrath v. United States*, 60 F.3d 1005 (2nd Cir.1995).

In *Indelicato* the defendant had two prior misdemeanor convictions under Massachusetts state law punishable by a maximum of two and one-half years in prison. Subsequent to those convictions, Indelicato was arrested with firearms and indicted for a violation of § 922(g)(1). The court found that the "civil rights restored" provision in § 921(a)(20) had the same effect on someone like Indelicato who had never had his civil rights taken away, as it did on someone who had their civil rights taken away and subsequently restored by operation of statute. The First Circuit found no sound reason why Congress would intend for a misdemeanant whose civil rights were never taken away to be more exposed to federal prosecution than a felon whose

rights were taken away and then later restored. *Indelicato*, 97 F.3d at 630. At the core of this inquiry is the status of a person's civil rights and whether a state deems that person sufficiently trustworthy to possess firearms, *Id.* (*citing McGrath*, 60 F.3d at 1009), not whether those rights had been taken away and later restored. *Id.*

In *McGrath*, the Second Circuit held that a person convicted of a felony who did not lose his civil rights under state law could not fall within the protection of the "unless" clause of § 921(a)(20) because the restoration of a thing never lost or diminished is a definitional impossibility. *McGrath*, 60 F.3d at 1007.

The Seventh Circuit followed the *McGrath* approach when it held that "[c]ompelled to choose between the holding of *Indelicato* and that of *McGrath*, we take the second circuit's part. The reason is simple. The word 'restore' means to give back something that had been taken away. As *McGrath* remarked, 'the "restoration" of a thing never lost or diminished is a definitional impossibility.'" *Logan*, 453 F.3d at 805.

Because there is a split between the circuits on the issue of the applicability of the Armed Career Criminal Act to misdemeanants who have never had their civil rights taken away, this Court should issue a writ of certiorari.

III. Importance Of The Issue.

The practical result of the Seventh Circuit's decision is counter-intuitive. It leaves a past felon or misdemeanant who has lost none of his civil rights and who can possess a firearm under state law exposed to conviction under federal law only because his civil rights technically have not been restored since he never lost them in the first place. This approach focuses too literally on the term "restored" and ignores the underlying principle and common sense application of the statute.

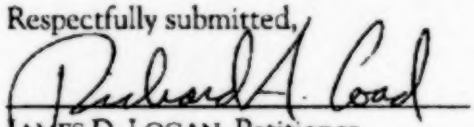
Moreover, the Seventh Circuit's holding in *Logan* and all those that follow the *McGrath* approach broadens the prosecutorial opportunities of the government beyond what was envisioned by the authors of the Fire Arms Owners Protection Act. It was passed in response to the Supreme Court's decision in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-12, 115 (1983) that state expunctions of state convictions did not avoid the ban of § 922(g)(1). The amendment added the restoration exception of § 921(a)(20) in order to protect gun owners (even those with felony convictions) who possessed their civil rights from prosecution under § 922(g)(1). To read the restoration provision as the Seventh Circuit did effectively allows the government, under the authority of § 922(g)(1), to prosecute misdemeanants who have never lost their civil rights under state law. Because the

holding of *Logan*, and *McGrath* now open up many United States Citizens to potential prosecution, this court should issue a writ of certiorari.

CONCLUSION

Petitioner prays that the Court grant a writ of certiorari and set this case for briefing and plenary consideration.

Respectfully submitted,



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In the
United States Court of Appeals
For the Seventh Circuit

No. 05-4722

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES D. LOGAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 05-CR-088-S-01—**John C. Shabaz**, *Judge.*

ARGUED JUNE 8, 2006—DECIDED JULY 6, 2006

Before EASTERBROOK, ROVNER, and EVANS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* This appeal presents a single question: whether a state conviction that did not result in a deprivation of civil rights can be a predicate offense under the Armed Career Criminal Act, 18 U.S.C. §924(e)(1). That statute enhances the penalty for gun-toting felons whose prior convictions include at least three violent crimes or serious drug offenses. A conviction that a state classifies as a misdemeanor counts if the punishment can exceed two years. 18 U.S.C. §§ 921(a)(20)(B), 924(e)(2)(B). Logan has (in addition to one concededly qualifying drug felony conviction) three battery convictions that, though called misdemeanors in Wisconsin, carried maximum terms of three years' imprisonment and are treated as "violent

felonies" by §924(e). Nonetheless, Logan maintains, they should be disregarded because the last sentence of §921(a)(20) excludes from the definition of "conviction" any offense that "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

Logan contends that a conviction that did not result in the loss of the rights to vote, hold public office, and serve on juries should be treated the same as a conviction following which those rights were terminated but later restored. This argument has the support of *United States v. Indelicato*, 97 F.3d 627 (1st Cir. 1996). The district court held, however, that an offender whose civil rights have been neither diminished nor returned is not a person who "has had civil rights restored". That conclusion, which has the support of *McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995), led to a 180-month sentence, the minimum for any armed career criminal.

Compelled to choose between the holding of *Indelicato* and that of *McGrath*, we take the second circuit's part. The reason is simple. The word "restore" means to give back something that had been taken away. As *McGrath* remarked, "the 'restoration' of a thing never lost or diminished is a definitional impossibility." 60 F.3d at 1007. Logan does not deny this, nor did the panel in *Indelicato*. That court recognized that it was going in the teeth of the statutory text but decided to do so because (a) it thought the statute silly—for why *should* someone whose civil rights were never taken away receive a higher federal sentence than a person who lost and then regained those rights?—and (b) no legislative history shows that Congress meant to distinguish between convicts who never lost civil rights and those who lost but regained them.

The second of these reasons is a makeweight. Statutes do not depend, for their force, on some statement in the

legislative history along the lines of: "We really mean it!" See, e.g., *Swain v. Pressley*, 430 U.S. 372, 378-79 (1977); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 591-92 (1980). Today's Supreme Court uses legislative history only to resolve ambiguities in enacted texts. Even the plainest legislative history does not justify going against an unambiguous enactment. See *Arlington Central School District v. Murphy*, No. 05-18 (U.S. June 26, 2006), slip op. 11-12; *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611, 2625-27 (2005). (Nor does explicit legislative history justify the creation of a legal rule on a subject about which the statute is silent. See *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).) And if legislative history directly addressing a subject does not free a court from enacted language, the *absence* of legislative history cannot do so. See *Whitfield v. United States*, 543 U.S. 209, 215-16 (2005).

As for *Indelicato*'s first reason: this is a variant on the proposition that courts read statutes to make sense rather than nonsense. Absurd possibilities are ruled out. We call *Indelicato*'s approach a variant of the anti-absurdity canon, however, because the first circuit did not mention it—and for good reason. The statute is not absurd as written. Its text parses; there is no linguistic garble. The canon is limited to solving problems in exposition, as opposed to the harshness that a well-written but poorly conceived statute may produce. See *Jaskolski v. Daniels*, 427 F.3d 456 (7th Cir. 2005). Accord, *Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (en banc). Otherwise judges would have entirely too much leeway to follow their own policy preferences by declaring that the legislative choice is harsh or jarring. See, e.g., Adrian Vermeule, *Judging Under Uncertainty* 57-59 (2006); John Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387 (2003).

The Supreme Court insists that statutes be enforced as written even when they seem mistaken or pointless—for

it is exactly then that the temptation to substitute one's judgment for the legislature's is strongest. See, e.g., *Dodd v. United States*, 545 U.S. 353 (2005) (the statute of limitations for collateral attacks on criminal convictions must be enforced as written even though time may expire before a challenge becomes possible, and even though this possibility likely resulted from legislative oversight); *Chapman v. United States*, 500 U.S. 453 (1991) (sentence for LSD must be based on the weight of the carrier medium as well as that of the drug, even though the carrier may be hundreds of times heavier and Congress may not have understood that LSD differs from other illegal drugs in this way). Laws are not "harsh" or "pointless" in any value-free framework; they seem harsh or pointless by reference to a given judge's beliefs about how things ought to work, which is why a claim of power to revise "harsh" or "pointless" laws elevates the judicial over the legislative branch and must be resisted. See *Tyler v. Cain*, 533 U.S. 656, 663 n.5 (2001).

Indelicato assumed that judges may correct a legislature's mistakes and oversights. It did not, however, identify any source of authority to do this—or for that matter explain why this statute is a botch. True enough, someone whose civil rights have not been revoked cannot have them restored. But restoration of civil rights is just one of three ways to erase a conviction from one's record for purposes of federal law. The other two—expungement and pardon—are as available to people who never lost their rights to vote, hold office, and serve on juries, as they are to other offenders.

Section 921(a)(20) acquired its current form in 1986 as a reaction to *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983). *Dickerson* held that federal rather than state law defines a "conviction" for purposes of 18 U.S.C. §§ 922 and 924, and that under federal law a conviction supports recidivist enhancements even after it has been expunged by the rendering court. The 1986 legislation makes the effect

of a conviction turn on state law—with the proviso that a pardon or restoration of rights removes the conviction for federal purposes, even if state law still would count it as a criminal conviction, "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." That's a federal anti-mousetrapping rule overlain on state law; a person told that his civil rights have been restored may assume that this means *all* rights unless he is informed that the right to vote (and so on) does not imply a right to carry firearms. See *United States v. Erwin*, 902 F.2d 510, 512-13 (7th Cir. 1990). Logan has not been misled by any state act that apparently freed him from the legal consequences of his battery convictions.

When Congress replaced *Dickerson*'s uniform federal rule with a state definition of conviction, it ensured that similarly situated people would be treated differently—for states vary widely in which if any civil rights a convict loses and whether these rights are restored. Some states deprive almost all convicts of these rights but restore them automatically after a set period. See *Caron v. United States*, 524 U.S. 308, 313-14 (1998) (agreeing with appellate consensus that restoration by operation of law has the same legal effect as restoration by act of personal clemency). Others take away fewer rights and make them harder to regain. The Office of the Pardon Attorney has compiled a list of these differences that conveys the flavor, though it may be out of date. U.S. Department of Justice, *Civil disabilities of convicted felons: a state-by-state survey* (1996), available at http://www.usdoj.gov/pardon/forms/ state_survey.pdf. Vermont, for example, permits felons not only to vote from prison (they get absentee ballots) but also to hold office, but not to serve on juries; New Hampshire permits them to serve on juries but not to vote until after release (and restoration then is automatic); other states take away all three rights (plus the right to carry firearms) and don't

restore them except via executive clemency. Most states would call the batteries of which Logan was convicted felonies and deprive the offender of civil rights (for in most states the dividing line between misdemeanor and felony is a maximum term of one year's imprisonment). Wisconsin ordinarily puts the dividing line lower: misdemeanor sentences can't exceed nine months in a local jail, and any time at all in the state prison system depends on a felony conviction. Wis. Stat. §939.60. Low sentences are accompanied by a rule that misdemeanants retain the right to vote. But even a misdemeanor conviction for battery by a repeat offender can carry a three-year sentence. See Wis. Stat. §939.62, §940.19(*l*). No reading of §921(a)(20) could produce identical treatment (for purposes of federal recidivist prosecutions) of people who commit the same crimes in different states.

When the first circuit in *Indelicato* combined what it perceived as an infelicitous enactment with the absence of "We really mean it!" legislative history, it was nodding in the direction of imaginative reconstruction—the idea that a court may implement what it is sure the legislature would have done (had it faced the question explicitly) rather than what the legislature actually did. The Supreme Court has anathematized that approach as democratically illegitimate, for it sets up the judiciary as the effective lawmakers. See, e.g., *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-01 (1991) (calling imaginative reconstruction a "usurpation" that "profoundly mistakes [the judicial] role"); *Tafflin v. Levitt*, 493 U.S. 455, 461-62 (1990) ("Petitioners . . . insist that if Congress had considered the issue, it would have [adopted a particular rule]. This argument . . . is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate"). This case illustrates the practical as well as the theoretical failings in that doctrine, for *Indelicato*'s guess about what Congress "would have done, had it thought" turns out to be wrong.

Section 922(g)(9) of the criminal code makes it unlawful for anyone "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm that is connected with interstate commerce. This section has a definitional provision corresponding to §921(a)(20). That provision, 18 U.S.C. §921(a)(33)(B)(ii), reads: "A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." This tracks §921(a)(20) in treating expungement, pardon, or restoration of civil rights as canceling all effect of the conviction—but it shows that the "restoration of civil rights" clause is inapplicable to one whose civil rights were never taken away. For such persons, expungement and pardon are the only ways to regain the right to possess firearms. In other words, when Congress addressed this subject directly, it supported the second circuit's conclusion in *McGrath*, not the first circuit's prediction in *Indelicato*.

Defendants have argued that §921(a)(33)(B)(ii) is itself absurd, and should not be applied as written, because (for example) the governor's pardon power in some states does not reach misdemeanor convictions. With one exception these arguments have been rejected, and courts have enforced this statute while noting, as *McGrath* had done for §921(a)(20), that the differences in state rules can lead otherwise identical offenders to be treated differently under federal law. See *United States v. Jennings*, 323 F.3d 263, 267-69 (4th Cir. 2003); *United States v. Kirchoff*, 387 F.3d 748 (8th Cir. 2004); *United States v. Smith*, 171 F.3d 617, 624-26 (8th Cir. 1999); *United States v. Hancock*, 231 F.3d

557, 566-67 (9th Cir. 2000); *United States v. Barnes*, 295 F.3d 1354, 1368 (D.C. Cir. 2002).

The outlier is *United States v. Wegrzyn*, 305 F.3d 593 (6th Cir. 2002). Persons convicted of domestic-violence misdemeanors in Michigan lose their right to vote only while incarcerated; it is restored automatically on release. Wegrzyn, who received a suspended sentence following his conviction, therefore did not lose any civil right. Without citing *McGrath*, *Indelicato*, or any of the earlier decisions under §921(a)(33)—for that matter, without parsing the statutory language—the sixth circuit declared that it would be absurd to treat more harshly (under federal law) someone who received a suspended sentence in Michigan than someone who had gone to prison there (presumably for a more serious domestic battery); *Wegrzyn* refused to apply the federal statutes as enacted. This shows that even when Congress addresses a subject as directly as possible—for §921(a)(33)(B)(ii) says point blank that people who were not deprived of their civil rights under state law differ from those whose rights were stripped and then restored—some judges still balk at applying what they find to be an unpalatable rule. *Wegrzyn*'s holding has been universally rejected by other courts that have addressed the identical question. In addition to *Jennings* and *Kirchoff*, see *United States v. Bailey*, 408 F.3d 609 (9th Cir. 2005). Just as the fourth circuit's opinion in *Jennings* disparaged *Indelicato* to the extent its approach reflected on the best understanding of §921(a)(33)(B)(ii), so we disapprove *Wegrzyn* to the extent its approach bears on the best understanding of §921(a)(20). Both of these statutes create ample potential for disparate treatment, but that's inherent in the legislative choice to make federal sentences depend on the states' different (and often internally inconsistent) approaches to revoking and restoring civil rights.

What a federal court *can* do, as a uniform matter, is count all state convictions unless the state extends a measure of

forgiveness. The last sentence of §921(a)(20) specifies how forgiveness is to be conveyed: pardon, expungement, or a restoration of civil rights. Logan's battery convictions did not qualify for the third means (though he *had* lost his civil rights in Wisconsin on account of his drug offense and never got them back) but potentially qualified for the first and second. So far as this record reveals, however, Logan never sought expungement or a pardon (and we know that, if he sought one, he did not obtain that boon). Wisconsin has neither forgiven him nor misled him about the (federal) consequences of his convictions, and as his convictions are serious enough to come within the federal definition of violent felonies they require sentencing as a recidivist under the Armed Career Criminal Act.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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December 22, 2005

Richard Coad
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222 W. Washington, Suite 300
Madison, WI 53703

Subject: **James D. Logan**
Docket No. 05-CR-88-S-01
Statement of Reasons - Confidential

Richard Coad:

Enclosed is the Statement of Reasons for the above defendant. Per the August 13, 2001, memo from the Administrative Office, this is being provided to you under separate cover from the Judgment and Commitment Order. **This document is confidential and is not for public disclosure.**

Sincerely,

Kristi Bakken/slh

Kristi A. Bakken
Sr. U.S. Probation Officer
(608)264-5165, ext 5768

KAB/slh

pc: AUSA Rita Rumbelow

Enclosure

(ATTACHMENT to the Judgment in a Criminal Case - NOT FOR PUBLIC DISCLOSURE)

STATEMENT OF REASONS

James D. Logan
Case No. 05-CR-088-S-01

The Court accepts defendant's guilty plea and proceeds with sentencing absent a written plea of agreement. In doing so, defendant is aware of the possibility that he is subject to a statutory minimum of 15 years and a maximum of life imprisonment pursuant to 18 U.S.C. § 924(e).

In McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005), the Seventh Circuit Court of Appeals has ruled that the remedial portion of Booker, which holds that decisions about sentencing factors will continue to be made by judges on the preponderance of the evidence, is an approach that comports with the Sixth Amendment so long as the guideline system has some flexibility in application.

The Court imposes a sentence consistent with the provisions set forth in 18 U.S.C. § 3553(a) using the November 2005 amended advisory guidelines calculated by the probation office in determining the appropriate sentence within the statutory limit of the count of conviction. The Court notes that the criminal history category of V has been reduced to category IV based on the omission of two points that had been assessed in paragraph 36 of the presentence investigation report. The two points are not counted because the conviction is outside the applicable time period allowed under § 4A1.2(e)(2). The advisory guideline calculations take into account all of the defendant's relevant conduct as defined at § 1B1.3. These calculations start with a base offense level of 20 under § 2K2.1(a)(4)(A) because the defendant committed the offense subsequent to sustaining a violent felony conviction. The subtotal of the offense level would ordinarily be 20; however, the defendant is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) and is also considered an Armed Career Criminal under the provisions of § 4B1.4. The Court finds that the defendant has three prior felony convictions for crimes of violence, specifically: battery as a repeater, Rock County Circuit Court, Case No. 87CR933; battery as a repeater, Rock County Circuit Court, Case No. 88CR817; and battery - habitual criminality, Rock County Circuit Court, Case No. 00CM371. The Court having determined that for each of these offenses, the defendant was found guilty as a repeater and the statutory maximum penalties associated with each conviction was three years. Accordingly, the battery convictions make the § 924(e) enhancement applicable to this case. These violent felonies each had as an element the use, attempted use or threat of physical force against the person of another and all convictions were "crimes punishable by a term of imprisonment exceeding one year." He never lost his civil rights which is equivalent to "restoration." His civil rights were not restored because he never suffered the loss of them. Restoration applies only to defendants whose civil rights were both lost and restored pursuant to state statutes. Under § 4B1.4(b)(3)(B) this results in a subtotal offense level 33. A two-level reduction is applicable under § 3E1.1(a) for acceptance of responsibility and an additional one-level reduction under subsection (b) because the defendant provided timely notification of his intention to enter a guilty plea. Under § 4B1.4(c)(3), the defendant's criminal history category remains at IV.

Pairing a total offense level of 30 with a criminal history category IV results in an advisory guideline imprisonment range of 135 to 168 months. However, a minimum 15-year or 180-month imprisonment term is required under 18 U.S.C. § 924(e).

The defendant is a 39-year-old violent felon with multi-convictions. He was arrested by Janesville police after they responded to a domestic disturbance complaint and recovered a loaded 9mm pistol and drug paraphernalia from his vehicle. He has a scant work history and reportedly has relied on his "barbering" skills as his primary means of support. Defendant has stated he is a long term heroin addict. He admittedly has not been a part of his nine children's lives or provided any financial support over the years as evidenced by the approximate $95,000 he owes in arrears. Defendant has not been deterred from committing further criminal conduct. His criminal history extends back to his adolescent years. Many of his early convictions were not considered in determining his criminal history category because the convictions occurred ten years prior to this offense. He also had a number of cases (many with active warrants) that were pending when he committed this offense.

The Court imposes the minimum 180-month imprisonment term as required by statute. Considering the nature and circumstances of the offense as well as the history and characteristics of the defendant, the Court determines this amount of time is reasonable, responsible, relevant and necessary to satisfy the statutory purposes of sentencing under 18 U.S.C. § 3553 which in this case is to physically incapacitate the defendant in order to protect the community from his undeterred and dangerous criminal conduct. This amount of time will also afford him the opportunity to participate in vocational training and substance abuse treatment in preparation for his eventual release back into the community.

Advisory Guideline Range Determined by the Court:	
Total Offense Level:	30
Criminal History Category:	IV
Imprisonment Range:	135 to 168 months
Supervised Release:	2 to 3 years
Fine Range:	$5,000.00 to $50,000.00
Restitution:	not applicable

No. 06-6911

IN THE SUPREME COURT OF THE UNITED STATES

JAMES D. LOGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
Counsel of Record

ALICE S. FISHER
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QUESTION PRESENTED

Petitioner's prior state convictions for misdemeanor battery did not result in the deprivation of his civil rights, and thus his civil rights have never been "restored." The question presented is whether those convictions were nonetheless exempt from consideration as prior convictions under the Armed Career Criminal Act, 18 U.S.C. 924(e)(1), on the ground that petitioner's civil rights should be regarded as "restored" within the meaning of 18 U.S.C. 921(a)(20).

IN THE SUPREME COURT OF THE UNITED STATES

No. 06-6911

JAMES D. LOGAN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 453 F.3d 804.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2006. The petition for a writ of certiorari was filed on September 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Western District of Wisconsin, petitioner was

convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-9.

1. Under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(1), a defendant convicted of being a felon in possession of a firearm is subject to a mandatory minimum 15-year sentence if he had at least three prior convictions for violent felonies or serious drug offenses. An offense classified by a State as a misdemeanor may qualify as a violent felony if the offense was punishable by more than two years of imprisonment. 18 U.S.C. 921(a)(20)(B), 924(e)(2)(B). Excluded from consideration, however, is "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored." 18 U.S.C. 921(a)(20).

2. On May 31, 2005, police officers responded to a domestic disturbance complaint by Asenath Wilson. Wilson told police that petitioner, her boyfriend, had punched her in the face. She also said that petitioner was outside her residence and that his car, which was parked in her garage, contained drugs and perhaps a handgun. After obtaining petitioner's consent to search his car, a police officer found a loaded pistol inside the glove compartment. The officer also recovered from the car a switchblade

knife and a device used for smoking crack cocaine. Gov't C.A. Br. 5.

3. After petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), the district court imposed a 15-year sentence under the ACCA. The court found that petitioner had one prior state felony conviction for possessing a controlled substance, and three prior state misdemeanor battery convictions that were punishable by a maximum of three years of imprisonment. Petitioner contended that the three misdemeanor convictions should be disregarded because they did not result in the loss of his rights to vote, hold public office, or serve on a jury, and should therefore be treated the same under Section 921(a)(20) as convictions for which those rights were terminated and later restored. The district court rejected petitioner's argument, holding that an offender whose civil rights had never been taken away cannot have had his civil rights "restored" within the meaning of Section 921(a)(20). If petitioner had not been treated as an armed career criminal, his advisory Sentencing Guidelines range would have been 37-46 months of imprisonment. See Pet. App. 1-2; Gov't C.A. Br. 6-7.

4. The court of appeals affirmed. Pet. App. 1-9. It held that Section 921(a)(20)'s exclusion of "[a]ny conviction * * * for which a person * * * has had civil rights restored" applies only when a State deprives a defendant of civil rights and later

restores them. Id. at 2. Because "[t]he word 'restore' means to give back something that had been taken away," the court explained that "'the 'restoration' of a thing never lost or diminished is a definitional impossibility." Ibid. (quoting McGrath v. United States, 60 F.3d 1005, 1007 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)).

The court of appeals acknowledged that the First Circuit had drawn a different conclusion in United States v. Indelicato, 97 F.3d 627 (1996), cert. denied, 519 U.S. 1140 (1997). Pet. App. 2. The court explained that the First Circuit had recognized that civil rights cannot be restored if they were never taken away, but had nonetheless held that defendants who never lost their civil rights should be treated the same as defendants who had their rights restored. Ibid. The court criticized the First Circuit for attempting to rewrite a statute it regarded as "infelicitous," explaining that a court is not authorized to "implement what it is sure the legislature would have done (had it faced the question explicitly) rather than what the legislature actually did." Id. at 6. The court further rejected Indelicato's reliance on the absence of legislative history showing that Congress meant to distinguish between the two situations, explaining that even the plainest legislative history cannot trump an unambiguous enactment, and the absence of legislative history certainly cannot do so. Id. at 3.

The court of appeals pointed out that under 18 U.S.C. 922(g)(9), which proscribes the possession of firearms by persons convicted of the misdemeanor crime of domestic violence, a person may not be regarded as having been convicted of such an offense "if he has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)," 18 U.S.C. 921(a)(33)(B)(ii) (emphasis added). See Pet. App. 7. Thus, the court noted that when Congress specifically addressed the issue presented here, albeit in a different statute, Congress recognized that rights can be restored only if they had been lost. Ibid. As a result, the court explained, "Indelicato's guess about what Congress 'would have done, had it thought' turns out to be wrong." Id. at 6.

The court of appeals noted that Section 921(a)(20) "create[s] ample potential for disparate treatment, but that's inherent in the legislative choice to make federal sentences depend on" state law. Pet. App. 8. "What a federal court can do, as a uniform matter, is count all state convictions unless the state extends a measure of forgiveness" by "pardon, expungement, or a restoration of civil rights." Id. at 8-9.

ARGUMENT

Petitioner contends (Pet. 6-11) that his prior state misdemeanor battery convictions should not count for purposes of the armed career criminal enhancement because they did not result

in the deprivation of his civil rights to vote, hold office, or serve on a jury. The court of appeals' decision is correct and does not warrant further review.

1. Petitioner correctly concedes (Pet. 7) that his position is at odds with the plain language of the statute. It is common ground that petitioner's state convictions are qualifying "violent felon[ies]" under 18 U.S.C. 924(e) unless petitioner "has had civil rights restored." 18 U.S.C. 921(a)(20). Petitioner concedes (Pet. 7), however, that his "civil rights were never taken away in the first place." Thus, those rights could not have been, and were not, restored. As the court of appeals explained, "[t]he word 'restore' means to give back something that had been taken away." Pet. App. 2; see Webster's Third International Dictionary 1936 (1976) ("to give back (as something lost or taken away)"). Because petitioner's civil rights were not taken away as a result of his misdemeanor battery convictions, they could not be "restored."

Section 921(a)(20)'s disparate treatment of convictions for which civil rights were never taken away, and convictions for which civil rights were terminated and then restored, is not irrational. Congress sought to exclude convictions for which a State has forgiven a defendant, whether by restoration of rights, expungement of a conviction, or pardon. See 18 U.S.C. 921(a)(20). Unlike the restoration of civil rights, expungement, and pardon, allowing the

retention of rights following conviction does not imply forgiveness.

No doubt, previously convicted defendants residing in some States will be more vulnerable to the armed career criminal enhancement than those residing in other States. But that is the natural effect of Congress's decision to allow state law to define which crimes count as predicate convictions, because state laws vary concerning a convict's loss of civil rights, and also concerning the standards for expungement, pardon, and restoration of rights. See Pet. App. 5-6; McGrath, 60 F.3d at 1009.

Petitioner errs in suggesting (Pet. 10) that Congress could not have intended the result here. As the court of appeals noted, Congress mandated that very result in a different statute even more explicitly than it did here. Pet. App. 7. Section 922(g)(9) bars firearm possession by a person convicted of a misdemeanor crime of domestic violence. In Section 921(a)(33)(B)(ii), Congress excepted from consideration prior misdemeanor domestic violence convictions for which the defendant "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)" (emphasis added). Accordingly, as the court below observed, "when Congress addressed the subject directly," it mandated the same result the court of appeals reached here. Pet. App. 7.*

---

* Although Section 921(a)(20) does not define "civil rights," the parties agree that "civil rights" under the statute include the rights to vote, to hold public office, and to serve on juries. See, e.g., Indelicato, 97 F.3d at 629; Pet. 7 n.1; Pet. C.A. Br. 9

2. As petitioner points out (Pet. 8-9), there is a conflict among the circuits on the question presented. Like the Seventh Circuit here, the Second Circuit has held, primarily on the basis of the plain meaning of the word "restored," that convictions for which civil rights were never taken away do not qualify for the exemption provided in Section 921(a)(20). McGrath, 60 F.3d at 1006-1110.

By contrast, the First Circuit held in Indelicato, 97 F.3d at 628-631, that civil rights that were not taken away should nonetheless be treated as "restored" under Section 921(a)(20). The Indelicato court acknowledged that its position was contrary to the "ordinary reading" of the word "restored." Id. at 629. Nevertheless, the court declined to be governed by the "literal" statutory language because there was "no indication" in the legislative history that Congress gave any attention to this issue, and because the court thought that Congress could not have wished to distinguish between convictions for which rights were not taken away and convictions for which rights were taken away and restored. Ibid.

---

n.2, 12. If a State restores those civil rights to a defendant, the underlying conviction does not qualify as a violent felony under ACCA unless the "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. 921(a)(20). This case concerns only the threshold question whether petitioner's civil rights to vote, hold office, or serve on a jury have been restored; it does not present the secondary question whether petitioner's possession of a handgun was prohibited by state law.

Indelcato's reliance on the absence of legislative history conflicts with this Court's repeated holdings that "mere silence in the legislative history" does not justify ignoring a statute's unambiguous text. Whitfield v. United States, 543 U.S. 209, 216 (2005). "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute." Harrison v. PPG Industries, Inc., 446 U.S. 578, 592 (1980). Nor, as discussed above, is there merit in Indelicato's assumption that Congress could not have intended to distinguish between convictions for which civil rights were not taken away and convictions for which they were taken away and restored. See pp. 6-7, supra.

3. In any event, the question presented does not warrant this Court's review. The First Circuit may eventually reconsider Indelicato in light of Section 921(a)(33)(B)(ii), which was enacted just 15 days before that case was decided. Indelicato does not address that statute, which undermines its view that Congress could not have intended the result mandated by the plain language of Section 921(a)(20).

In addition, the question presented is "unlikely to matter outside of a very few states." Indelicato, 97 F.3d at 631. The ban on firearm possession by a convicted misdemeanant applies only if the misdemeanor is punishable by more than two years of imprisonment. 18 U.S.C. 921(a)(20)(B). Such a punishment is

"unusual" for a misdemeanor, because the traditional distinction between felonies and misdemeanors is that a felony may be punished by more than one year of imprisonment. Indelicato, 97 F.3d at 631. Thus, as the court below observed, "[m]ost states would call the batteries of which [petitioner] was convicted felonies and deprive the offender of civil rights." Pet. App. 6. Moreover, "all but a very few states" take away from every felon at least one of the three civil rights in question. Indelicato, 97 F.3d at 631. Accordingly, actual restoration will be possible in the vast majority of cases, ibid., and the question presented here will arise too infrequently to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

JANUARY 2007

No. 06-6911

MAY 25 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES D. LOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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May 25, 2007

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PETITION FOR CERTIORARI FILED SEPTEMBER 29, 2006
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
(Madison)

Case No. 05-CR-0088-S-01

UNITED STATES OF AMERICA,
Plaintiffs,

v.

JAMES D. LOGAN,
Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
06/06/2005	1	COMPLAINT
06/06/2005		WARRANT ISSUED 6/2/05.
06/22/2005	2	JS 45
06/22/2005	3	INDICTMENT
06/23/2005		ARRAIGNMENT SET FOR 7/19/05, 10 AM.
06/27/2005	4	NOTICE OF APPEARANCE BY ATTY. RICHARD COAD.
06/28/2005	5	APPLICATION AND ORDER FOR WHCAP FOR DEFT. APPEARANCE ON 7/19/05; WRIT ISSUED-DELIVERED TO USMS.
07/19/2005	6	CTRM. MIN: ARRG.; N.G. PLEA ENTERED; SCHEDULE SET; DEFT. DETAINED. (SLC) 15"
07/20/2005	7	WRIT W/USMS RETURN RE: 7/19/05 ARRG. HRG.

DATE	NO.	PROCEEDINGS
07/21/2005	8	ORDER SCHEDULING. (SLC)
07/21/2005	9	ORDER OF DETENTION PENDING TRIAL. (SLC)
07/27/2005	10	APPLICATION/ORDER FOR WHCAT FOR DEFT. 8/31/05 HRG; WRIT ISSUED; DELIVERED TO USMS FOR SERVICE. (SLC) CC MLD.
07/27/2005	11	APPLICATION/ORDER FOR WHCAT FOR DEFT. 9/30/05 HRG.; WRIT ISSUED; DELIVERED TO USMS FOR SERVICE. (SLC) CC MLD.
07/27/2005	12	APPLICATION/ORDER FOR WHCAT FOR DEFT. 10/7/05 HRG.; WRIT ISSUED; DELIVERED TO USMS FOR SERVICE. (SLC) CC MLD.
07/27/2005	13	APPLICATION/ORDER FOR WHCAT FOR DEFT. 10/11/05 HRG.; WRIT ISSUED; DELIVERED TO USMS FOR SERVICE. (SLC) CC MLD.
09/02/2005	14	WRIT RETURNED UNEXECUTED FOR DEFT. 8/31/05 APPEARANCE; HEARING HELD TELEPHONICALLY.
09/06/2005	15	PTC ORDER (SLC)
09/20/2005		PLEA HEARING SET FOR 9/28/05 AT 1:15 PM.
09/28/2005	16	CTRM. MIN: PLEA HRG.; GUILTY PLEA ENTERED; PSR DUE 11/9/05, OBJ. DUE 11/23/05, SCTG. 12/7/05 AT 1:15 PM. 28"
09/28/2005	17	PLEA AGREEMENT

DATE	NO.	PROCEEDINGS
10/03/2005	18	WRIT RETURNED UNEXECUTED RE: 10/11/05 HRG; DEFT. ENTERED GUILTY PLEA.
10/03/2005	19	WRIT W/USMS RETURN; AS TO DEFT. 9/28/05 HRG.
10/03/2005	20	WRIT RETURNED UNEXECUTED RE: 10/7/05; DEFT. ENTERED GUILTY PLEA.
11/23/2005		RECD. GOVT. LETTER STATING NO OBJ. TO PSR; DELIVERED TO JCS.
12/02/2005		RECD. DEFT. SENTENCING MEMORANDUM; DELIVERED TO BBC.
2/05/2005	21	APPLICATION AND ORDER FOR WHCAP FOR DEFT. APP. ON 12/7/05; WRIT ISSUED; DELIVERED TO USMS FOR SERVICE. (SLC) CC MLD.
12/07/2005	22	CTRM. MIN: STCG.; PLEA AGREEMENT REJECTED; MATTER TO BE SET FOR SCHEDULING. 12"
12/08/2005	23	ORDER REJECTING PLEA AGREEMENT; HEARING TO BE SET.
12/08/2005	24	WRIT W/USMS RETURN.
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12/16/2005	25	APPLICATION AND ORDER FOR WHCAP FOR DEFT. APP. ON 12/16/05; WRIT ISSUED; DELIVERED TO USMS FOR SERVICE. (TMO) CC MLD.
12/16/2005	26	CTRM. MIN: STCG.; CT. 1: CBOP 180 MOS.; 3 YRS. S/R; $100 CA; DEFT. DETAINED. 25"

DATE	NO.	PROCEEDINGS
12/19/2005	27	JUDGMENT AND COMMITMENT ENTERED. CC MLD.
12/20/2005	28	WRIT W/USMS RETURN.
12/22/2005	29	NOTICE OF APPEAL BY DEFT. NO FEE PAID, DS FILED, SR SENT CC:PARTIES (05-4722)
12/23/2005	30	COPY OF PSR W/ATTACHMENTS. (SEALED)
12/23/2005	31	COPY OF SENT RECOMM W/STATEMENT OF REASONS. (SEALED)
12/23/2005		RECORD PREPARED
01/13/2006	32	TRANSCRIPT OF PLEA HEARING, HELD 9/28/05.
01/13/2006	33	TRANSCRIPT OF SENTENCING, HELD 12/7/05.
01/13/2006	34	TRANSCRIPT OF SENTENCING, HELD 12/16/05.
04/20/2006		RECORD SENT
08/01/2006	35	JUDGMENT FROM THE USCA AFFIRMING THE DIST CRT. (05-4722) RECORD RETURNED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No. 05-4722

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES D. LOGAN,
Defendant-Appellant.

DOCKET ENTRIES

DATE	PROCEEDINGS
12/22/05	Criminal case docketed. [05-4722] [1936792-1] Transcript information sheet due 1/3/06. Appellant's brief due 1/31/06 for James D. Logan. (amyd)
12/22/05	Filed Appellant James D. Logan docketing statement. [05-4722] [1936796-1] (amyd)
12/27/05	Filed Seventh Circuit Transcript Information Sheet by Richard A. Coad for Appellant James D. Logan. [05-4722] [1936792-1] (trot)
1/9/06	Filed motion by Appellant James D. Logan to extend time to file appellant's brief. [1941269-1] [05-4722] (stef)
1/12/06	ORDER issued GRANTING motion for extension of time to file appellant's brief. [1941269-1] JKL [05-4722] 1. Appellant's brief due 3/2/06 for James D. Logan. 2. The appellee(s) brief is due on or before 4/3/06 for USA. 3. The reply brief, if any, is due 4/17/06 for James D. Logan. (kell)

DATE	PROCEEDINGS
3/2/06	Filed 15c appellant's brief by James D. Logan. Disk filed. [05-4722] [0-0] (stef)
3/2/06	Disclosure Statement filed by Richard A. Coad for Appellant James D. Logan. [05-4722] [1936792-1] (kell)
4/4/06	Filed 15c appellee's brief by USA. Disk filed. [05-4722] [0-0] (ocon)
4/20/06	ORDER: Argument set for Thursday, June 8, 2006 at 10:30 a.m. Each side limited to 10 minutes. [05-4722] [1977546-1] (andb)
4/26/06	Original record on appeal filed. Contents of record: 1 vol. pleadings; 3 vol. transcripts; 2 envelopes in camera. [05-4722] [1979134-1] (kuzi)
5/8/06	Oral argument confirmation card filed by attorney(s) Rita M. Rumbelow for Appellee USA. [05-4722] [1936792-1] (scze)
5/25/06	Oral argument confirmation card filed by attorney(s) Richard A. Coad for Appellant James D. Logan. [05-4722] [1936792-1] (scze)
6/8/06	Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Ilana D. Rovner, Circuit Judge Terence T. Evans. [05-4722] [1993631-1] (josh)
6/8/06	Case argued by Richard A. Coad for Appellant James D. Logan, Rita M. Rumbelow for Appellee USA. [05-4722] [1936792-1] (josh)
7/6/06	Filed opinion of the court by Judge EASTERBROOK. AFFIRMED. Circuit Judge Frank H. Easterbrook, Circuit Judge Ilana D. Rovner,

DATE	PROCEEDINGS
	Circuit Judge Terence T. Evans. [05-4722] [1936792-1] (mank)
7/6/06	ORDER: Final judgment filed per opinion. With costs: n. [05-4722] [2002132-1] (mank)
7/28/06	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 1 vol. pleadings; 3 vol. transcripts; 2 in camera envelopes) [05-4722] [0-0] (stef)
8/7/06	Filed mandate receipt. [05-4722] [2012882-1] (scze)
10/10/06	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 06-6911. [05-4722] [2033541-1] (hudk)
2/27/07	Filed order from the Supreme Court GRANTING the motion for leave to proceed in forma pauperis and the Petition for a Writ of Certiorari. Supreme Court Case No.: 06-6911. [05-4722] [2086354-1] (jame)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 05-CR-0088-S-01

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES D. LOGAN,

Defendant.

Madison, Wisconsin
September 28, 2005
1:15 p.m.

TRANSCRIPT OF PLEA HEARING
HELD BEFORE THE HONORABLE JOHN C. SHABAZ

[14] * * * *

The Court: At this time Ms. Rumbelow will be asked to provide us the essential elements of the offense, that is, what the government would be required to prove at trial, and explain the facts constituting a crime so that the jury would then determine your guilt beyond a reasonable doubt. Is that your understanding—Well, you probably aren't aware of that. So listen to those comments provided to us by the United States Attorney, Ms. Rumbelow.

MS. RUMBELOW: Your Honor, to establish a violation of Title 18 United States Code Section 922(g)(1) the government has to prove three essential elements. First, that prior to May 31st, 2005 the defendant had been convicted of a crime punishable by a term of imprisonment exceeding one year. Second, that on May 31st, 2005 he knowingly and unlawfully possessed a firearm. Third, that the firearm had previously traveled in interstate commerce.

Had this case gone to trial officers with the Beloit, Wisconsin Police Department would have testified that on May 31st, 2005 they responded to a call at the residence of Asenath, A-S-E-N-A-T-H, Wilson. When the officers arrived at the residence they encountered both Asenath Wilson and the defendant, James Logan. Asenath Wilson would have testified that she had a relationship with Mr. Logan, she had seen him in [15] possession of a handgun, and that he usually carried the handgun in his car.

Officers would have testified that they asked Mr. Logan for consent to search his car. He stated that he usually could not get the glove box open but he did consent to the search of the car. Officers would have testified that a search of the car then belonging to James Logan revealed a Norinco 9mm pistol, Serial No. 22008471 in a hidden compartment behind the glove box. The government would have introduced the fact that Mr. Logan had previously been convicted of a felony offense, that being unlawful possession of a controlled substance, in 1991, Boone County, Illinois.

William Baudhuin from the Bureau of Alcohol, Tobacco, Firearms and Explosives would have testified that the Norinco was manufactured in China. And the government would have asked the Court to take judicial notice that Beloit is in the Western District of Wisconsin.

THE COURT: The Court does take judicial notice that Beloit is in the Western District of Wisconsin.

Mr. Logan, prior to May 31 of 2005 had you been convicted of a crime punishable by a term of imprisonment exceeding one year?

DEFENDANT LOGAN: Yes, sir.

THE COURT: And where were you convicted? In Illinois? Of that crime?

[16] DEFENDANT LOGAN: It was in Wisconsin. Yes, it's Illinois.

THE COURT: Illinois?

DEFENDANT LOGAN: Yes.

THE COURT: Do you recall what the crime was?

DEFENDANT LOGAN: No, not offhand.

THE COURT: But you do understand that you were convicted of a felony, is that correct?

DEFENDANT LOGAN: Yes, sir.

THE COURT: And do you understand that for that crime you were subject to a term of imprisonment exceeding one year? Is that your understanding as well?

DEFENDANT LOGAN: Yes, sir.

THE COURT: And on May 31 of 2005 did you knowingly and unlawfully possess a Norinco 9mm pistol, Serial No. 22008471?

DEFENDANT LOGAN: Yes, sir.

THE COURT: And was that firearm in the glove compartment of your automobile?

DEFENDANT LOGAN: Yes, sir.

THE COURT: And had you been a convicted felon at that time?

DEFENDANT LOGAN: Yes, sir.

THE COURT: And do you understand that this firearm having been manufactured in China and found in the United States [17] then had previously traveled in interstate commerce? Do you understand that?

DEFENDANT LOGAN: Yes, sir.

THE COURT: And did the officers come to Ms. Wilson's place of residence and arrest you?

DEFENDANT LOGAN: Yes, sir.

THE COURT: And did that then come to a search of your automobile?

DEFENDANT LOGAN: Yes, sir.

THE COURT: Did you give consent to that search?

DEFENDANT LOGAN: Yes, sir.

THE COURT: Anything further?

MS. RUMBELOW: Your Honor, I would like the record to reflect that this did not occur in Beloit, Wisconsin, it occurred in Janesville, Wisconsin. And I would ask the Court to take judicial notice that Janesville is in the Western District of Wisconsin.

THE COURT: Do you know where this search took place, what city?

DEFENDANT LOGAN: Yes, sir.

THE COURT: Was it Janesville?

DEFENDANT LOGAN: Yes, sir.

THE COURT: Janesville, Wisconsin?

DEFENDANT LOGAN: Yes, sir.

THE COURT: The Court does determine that Janesville, [18] as with Beloit, is in the Western District of Wisconsin, although I do believe both of them are in Rook County, but the fact is one is some distance away from the other, and the Court will find judicial notice. Anything further?

MS. RUMBELOW: No, Your Honor.

THE COURT: The Court then at this time will advise the defendant, Mr. Logan, if you plead guilty a presentence report

will be prepared and you will then—and the Court will then consider whether or not to accept the plea agreement. If it decides to reject the plea agreement, you will then have an opportunity to withdraw your plea and change it to not guilty. Do you understand that?

DEFENDANT LOGAN: Yes.

THE COURT: And do you disagree with anything other than the Beloit-Janesville difference which was offered to us by Ms. Rumbelow?

DEFENDANT LOGAN: No.

THE COURT: Do you accept all of those facts as stated?

DEFENDANT LOGAN: Yes, sir.

THE COURT: How then do you now plead to the charge which is pending against, you, guilty or not guilty?

DEFENDANT LOGAN: I plead guilty.

THE COURT: It's the finding of the Court in the case of United States of America against James D. Logan, 5-CR-088-S, [19] that the defendant, James D. Logan, is fully competent and capable of entering an informed plea, that he is aware of the nature of the charge and the consequences of the plea, and that the plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. The plea accordingly is accepted and defendant is now adjudged guilty of that offense set forth in Count 1 of the Indictment pending against him.

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 05-CR-0088-S-01

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES D. LOGAN,
Defendant.

Madison, Wisconsin
December 16, 2005
2:30 p.m.

TRANSCRIPT OF SENTENCING
HELD BEFORE THE HONORABLE JOHN C. SHABAZ

* * * *

[2] THE COURT: All right. Why don't we then begin where we left off the last time we were together. You'll recall that the defendant had previously entered into a plea agreement and pled guilty to a one-count Indictment with the understanding that the maximum statutory imprisonment term was 10 years. The presentence investigation revealed details of his criminal history that indicated to the Court that the defendant could have been subject to the enhanced penalties under 18 United [3] States Code Section 924(e) which requires a minimum mandatory imprisonment term of 15 years. The armed career criminal provisions under United States Sentencing Guidelines Section 4B1.4 would then be applicable. These provisions of course would be subject—would subject the defendant to an advisory guideline imprisonment range of 135

to 168 months. However, the minimum sentence would be 180 months as required by statute.

With this in mind the Court rejected the plea agreement on December 7, 2005, at which time defendant advised the Court he did not want to withdraw his guilty plea. The matter was adjourned until counsel could adequately consult with Mr. Logan. On December 12, 2005 defense counsel informed the government that the defendant wished to proceed with sentencing without a written plea agreement. Is that still the juncture at which we are, Mr. Coad?

MR. COAD: Yes, Judge.

THE COURT: Is that your understanding as well, Mr. Logan?

DEFENDANT LOGAN: Yes, sir.

THE COURT: And do you understand that you could, sir, be subject to the enhanced penalties in this matter as previously announced by the Court to a mandatory term of 15 years in prison? Do you understand that?

DEFENDANT LOGAN: Yes, sir,

[4] THE COURT: And knowing that, do you wish to proceed sentencing without a plea agreement?

DEFENDANT LOGAN: Yes, sir.

* * * *

[7] MR. COAD: I said I'm all right, but one thing that I don't think is cumulative to my written submission to the Court, if the Court finds that Mr. Logan—Mr. Logan's predicates or prior convictions count under armed career criminal and it accepts the government's position, under 922(g)(1) I think it's important to note that the government would be able then to prosecute individuals for run-of-the-mill felony—felon in possession of firearms under 922(g)(1) who have been convicted in Wisconsin of misdemeanors, never convicted of

felonies, who may lawfully carry a firearm under Wisconsin law. They would then be subject to federal [8] prosecution under 922(g)(1) and I think that that expands certainly to common practice now in this district and I think it would be significant. And I think that that definition applies equally to 922(g)(1) and that changes the scope of that statute in my view. And that's all I have, Judge.

THE COURT: Response.

MS. RUMBELOW: It would ultimately if the Seventh Circuit—I mean, it depends on what the Court rules today and then if we end up at the Seventh Circuit on the issue. But just assuming for sake of argument that that's where we find ourselves, you know, six months, nine months from now, the Seventh Circuit will ultimately decide it and it's really not relevant for purposes of—for today's purposes it's not relevant to how the government decides in the future to bring about 922(d) indictments.

THE COURT: All right, the Court accepts the defendant's guilty plea. It is my understanding he has continued to enter a plea without a plea agreement. The Court then does accept that guilty plea and will proceed with sentencing absent a written plea agreement. In doing so, defendant is aware of the possibility that he is subject to a statutory minimum of 15 years and a maximum of life imprisonment pursuant to 18 United States Code Section 924(e).

In light of the Supreme Court's decision in *Booker* the Court will use the sentencing guidelines in this case for [9] advisory purposes only and will consider as well the statutory purposes of sentencing which are set out in 18 United States Code Section 3553(a). In *McReynolds against United States* the Seventh Circuit Court of Appeals ruled that the remedial portion of *Booker* which holds that decisions about sentencing factors will continue to be made by judges, on the preponderance of the evidence, is an approach that comports

with the Sixth Amendment so long as the guideline system has some flexibility in its application.

The amended advisory guideline calculations using the November 2005 Guidelines Manual provide that the criminal history category of V has been reduced to Category IV based on the omission of two points that had been assessed in paragraph 36 of the presentence investigation report. The two points are not counted because the conviction is outside the applicable time period allowed under Section 4A1.2(e)(2). The advisory guideline calculations take into account all of defendant's relevant conduct as defined in Section 1B1.3.

These calculations start with a base offense 20 under Section 2K2.1(a)(4)(A) because the defendant committed the offense subsequent to sustaining a violent felony conviction. The subtotal of the offense level would ordinarily be 20. However, he is subject to an enhanced sentence under the provisions of 18 United States Code Section 924(e) and is also considered an armed career criminal under the provisions of [10] 4B1.4.

The Court finds that the defendant has three prior felony convictions for crimes of violence. Specifically, battery as a repeater, Rock County Circuit Court Case No. 87-CR-933. Battery as a repeater, Rock County Circuit Court Case No. 88-CR-817. And battery habitual criminality, Rock County Circuit Court Case No. 00-CM-371. Under Section 4B1.4(b)(3)(B) this results in a subtotal offense level 33. A two-level reduction is applicable under 3E1(a) for acceptance of responsibility. And based on the government's motion if it is to made, an additional one-level reduction under (b).

MS. RUMBELOW: It is, Your Honor.

THE COURT: That is ordered because the defendant provided timely notification of his intention to enter a guilty plea. Under Section 2B1.4(c)(4) the defendant's criminal history category remains at IV. Accordingly, pairing a total

offense level of 30 with a criminal history category of IV results in an advisory guideline imprisonment range of 135 to 168 months. However, a minimum 15-year or 180-month imprisonment term is required under 18 United States Code Section 924(e).

Any further comments that either counsel or the defendant wishes to make before sentencing? Mr. Logan.

DEFENDANT LOGAN: No, sir.

THE COURT: Mr. Coad.

[11] MR. COAD: Briefly, Judge, I think 180 months is enough. It's above the advisory guideline range. Taking into account Mr. Logan's struggle with his heroin addiction which I think contributes a lot to his inability to comport with the law. He's accepted responsibility, hasn't wavered. There's no aggravating circumstances here, the use or threatened use of a gun. I would ask the Court not to impose a fine and to keep Mr. Logan at a facility, a Bureau of Prisons facility close to the state of Wisconsin.

And in a final note, Judge, I've gotten to know Mr. Logan. His intelligence, humor and his ability to relate with people at the jail who work at the jail where he's been for so long and with me, with other people I've seen, it belies his criminal history and I'm sorry that he's faced with this penalty today. But I think that 180 months is a sufficient punishment and deterrent in this case. Thank you.

THE COURT: Ms. Rumbelow.

MS. RUMBELOW: Nothing Your Honor.

THE COURT: The defendant, James Logan, is 39 years old and a violent multi-conviction felon. He was arrested by Janesville police after they responded to a domestic disturbance complaint and recovered a loaded 9mm pistol and drug paraphernalia from his vehicle. All of his relevant conduct

has been taken into account in formulating the applicable offense level.

[12] He has a scant work history and repeatedly has relied on his barbering skills as his primary means of support. He states that he's a long-term heroin addict. At this point he admittedly has not been a part of his children's lives or provided financial support over the years, owing $95,000 in arrears for support.

He has not been deterred from committing further criminal conduct. His criminal history extends back to his adolescent years. Many of his earlier convictions were not considered in determining his criminal history category because the convictions occurred 10 years prior to the commission of this offense. He has had a number of cases, many with active warrants, that were pending when he committed this offense. The presentence report has revealed the details of his criminal history and indicated that he has not been dissuaded from his criminal conduct over the years. The Court as aforesaid rejected the plea agreement based upon his criminal record and at this time will announce the sentence.

The Court imposes the minimum 180-month imprisonment term as required by statute. Considering the nature and circumstances of the offense as well as the history and characteristics of the defendant, the Court believes this amount of time is necessary to satisfy the statutory purposes of sentencing under 18 United States Code Section 3553 which in this case is to physically incapacitate the defendant in order [13] to protect the community from his undeterred and dangerous criminal conduct. The amount of time will also afford him the opportunity to participate in vocational training and substance abuse treatment in preparation for the eventual release back into the community.

* * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

[Filed DEC. 19, 2005]

Case Number: 05-CR-088-S-01
Defendant's Attorney: Richard Coad

UNITED STATES OF AMERICA,

v.

JAMES D. LOGAN.

The defendant James Logan pleaded guilty to Count 1 of the indictment.

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm, a Class C felony	May 31, 2005	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Date of Birth:	December 8, 1965
Defendant's USM No.:	05951-090
Defendant's Residence Address:	c/o Harvey Logan 1106 Henderson Street Beloit, WI 53511

Defendant's Mailing Address: c/o Rock County Jail
200 Hwy 14 East
Janesville, WI 53545

December 16, 2005
Date of Imposition of Judgment

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

December 19, 2005
Date Signed:

IMPRISONMENT

Defendant is committed to the custody of the United States Bureau of Prisons for imprisonment for a period of 180 months.

The Court recommends the defendant consider taking advantage of the opportunity to apply for vocational training and substance abuse treatment while confined.

It is further recommended that the defendant be afforded a prerelease placement in a community corrections center with work release privileges but without home confinement during the final months of his confinement.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to_____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, defendant shall be on supervised release for a term of three years.

Defendant shall report to the probation office in the district to which defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

Defendant shall not commit another federal, state, or local crime.

Defendant shall not illegally possess a controlled substance.

If defendant has been convicted of a felony, defendant shall not possess a firearm, destructive device, or other dangerous weapon while on supervised release.

Defendant shall cooperate with the collection of DNA by the U.S. Justice Department and/or the U.S. Probation and Pretrial Services Office as required by Public Law 108-405.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth on the next page).

Defendant shall also comply with the following special conditions:

(1) Provide the supervising probation officer with any requested financial information, including the timely submission of copies of his federal and state income tax returns;

(2) Register with local law enforcement agencies and the state attorney general as directed by the supervising probation officer;

(3) Submit his person, residence, office, or vehicle to a search, conducted by a U.S. probation officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall advise any other residents that the premises may be subject to searches pursuant to this condition;

(4) Refrain from any association with drug users and sellers, and participate in substance abuse treatment and testing as directed by the supervising probation officer;

(5) Abstain from the use of alcohol and not patronize any establishment where the principal item of sale is alcohol; and

(6) Pay child support arrears in accordance with any court order.

STANDARD CONDITIONS OF SUPERVISION

1) Defendant shall not leave the judicial district without the permission of the court or probation officer;

2) Defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) Defendant shall support his or her dependents and meet other family responsibilities;

5) Defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) Defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

7) Defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) Defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) Defendant shall not enter info any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

Count	Assessment	Fine	Restitution
	$100.00	$0.00	$0.00
Total	$100.00	$0.00	$0.00

Pursuant to 18 U.S.C. § 3013, defendant is ordered to pay a criminal assessment in the amount of $100.00. The criminal assessment is to be paid immediately to the Clerk of Court for the Western District of Wisconsin.

The defendant has neither the present means nor the earning capacity to pay a fine under § 5E1.2(c) without impairing his ability to support himself and pay his child support arrears upon release.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:

(1) assessment;
(2) restitution;
(3) fine principal;
(4) cost of prosecution;
(5) interest;
(6) penalties.

The total fine and other monetary penalties shall be due in full immediately unless otherwise stated elsewhere.

Unless the court has expressly ordered otherwise in the special instructions above, if the judgment imposes a period of imprisonment, payment of monetary penalties shall be due during the period of imprisonment.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 05-4722

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES D. LOGAN,
Defendant-Appellant.

Argued June 8, 2006
Decided July 6, 2006

Before EASTERBROOK, ROVNER, and EVANS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.*

This appeal presents a single question: whether a state conviction that did not result in a deprivation of civil rights can be a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). That statute enhances the penalty for gun-toting felons whose prior convictions include at least three violent crimes or serious drug offenses. A conviction that a state classifies as a misdemeanor counts if the punishment can exceed two years. 18 U.S.C. §§ 921(a)(20)(B), 924(e)(2)(B). Logan has (in addition to one concededly qualifying drug felony conviction) three battery convictions that, though called misdemeanors in Wisconsin, carried maximum terms of three years' imprisonment and are treated as "violent felonies" by § 924(e). Nonetheless, Logan maintains, they should be disregarded because the last sentence of § 921(a)(20) excludes from the definition of "conviction" any offense that "has been expunged, or set aside or for which a

person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

Logan contends that a conviction that did not result in the loss of the rights to vote, hold public office, and serve on juries should be treated the same as a conviction following which those rights were terminated but later restored. This argument has the support of *United States v. Indelicato*, 97 F.3d 627 (1st Cir. 1996). The district court held, however, that an offender whose civil rights have been neither diminished nor returned is not a person who "has had civil rights restored". That conclusion, which has the support of *McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995), led to a 180-month sentence, the minimum for any armed career criminal.

Compelled to choose between the holding of *Indelicato* and that of *McGrath*, we take the second circuit's part. The reason is simple. The word "restore" means to give back something that had been taken away. As *McGrath* remarked, "the 'restoration' of a thing never lost or diminished is a definitional impossibility." 60 F.3d at 1007. Logan does not deny this, nor did the panel in *Indelicato*. That court recognized that it was going in the teeth of the statutory text but decided to do so because (a) it thought the statute silly—for why *should* someone whose civil rights were never taken away receive a higher federal sentence than a person who lost and then regained those rights?—and (b) no legislative history shows that Congress meant to distinguish between convicts who never lost civil rights and those who lost but regained them.

The second of these reasons is a makeweight. Statutes do not depend, for their force, on some statement in the legislative history along the lines of: "We really mean it!" See, e.g., *Swain v. Pressley*, 430 U.S. 372, 378-79, 97 S.Ct. 1224,

51 L.Ed.2d 411 (1977); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 591-92, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980). Today's Supreme Court uses legislative history only to resolve ambiguities in enacted texts. Even the plainest legislative history does not justify going against an unambiguous enactment. See *Arlington Central School District v. Murphy*, ___ U.S. ___, ___ - ___, 126 S.Ct. 2455, 2459, 165 L.Ed.2d 526, 534 (2006); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, ___ U.S. ___, ___ - ___, 125 S.Ct. 2611, 2625-27, 162 L.Ed.2d 502, 526-28 (2005). (Nor does explicit legislative history justify the creation of a legal rule on a subject about which the statute is silent. See *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir.2005).) And if legislative history directly addressing a subject does not free a court from enacted language, the *absence* of legislative history cannot do so. See *Whitfield v. United States*, 543 U.S. 209, 215-16, 125 S.Ct. 687, 160 L.Ed.2d 611 (2005).

As for *Indelicato*'s first reason: this is a variant on the proposition that courts read statutes to make sense rather than nonsense. Absurd possibilities are ruled out. We call *Indelicato*'s approach a variant of the anti-absurdity canon, however, because the first circuit did not mention it—and for good reason. The statute is not absurd as written. Its text parses; there is no linguistic garble. The canon is limited to solving problems in exposition, as opposed to the harshness that a well-written but poorly conceived statute may produce. See *Jaskolski v. Daniels*, 427 F.3d 456 (7th Cir. 2005). Accord, *Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (en banc). Otherwise judges would have entirely too much leeway to follow their own policy preferences by declaring that the legislative choice is harsh or jarring. See, e.g., Adrian Vermeule, *Judging Under Uncertainty* 57-59 (2006); John Manning, *The Absurdity Doctrine*, 116 Harv. L.Rev. 2387 (2003).

The Supreme Court insists that statutes be enforced as written even when they seem mistaken or pointless—for it is exactly then that the temptation to substitute one's judgment for the legislature's is strongest. See, e.g., *Dodd v. United States*, 545 U.S. 353, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005) (the statute of limitations for collateral attacks on criminal convictions must be enforced as written even though time may expire before a challenge becomes possible, and even though this possibility likely resulted from legislative oversight); *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (sentence for LSD must be based on the weight of the carrier medium as well as that of the drug, even though the carrier may be hundreds of times heavier and Congress may not have understood that LSD differs from other illegal drugs in this way). Laws are not "harsh" or "pointless" in any value-free framework; they seem harsh or pointless by reference to a given judge's beliefs about how things ought to work, which is why a claim of power to revise "harsh" or "pointless" laws elevates the judicial over the legislative branch and must be resisted. See *Tyler v. Cain*, 533 U.S. 656, 663 n. 5, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001).

Indelicato assumed that judges may correct a legislature's mistakes and oversights. It did not, however, identify any source of authority to do this—or for that matter explain why this statute is a botch. True enough, someone whose civil rights have not been revoked cannot have them restored. But restoration of civil rights is just one of three ways to erase a conviction from one's record for purposes of federal law. The other two—expungement and pardon—are as available to people who never lost their rights to vote, hold office, and serve on juries, as they are to other offenders.

Section 921(a)(20) acquired its current form in 1986 as a reaction to *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983). *Dickerson* held

that federal rather than state law defines a "conviction" for purposes of 18 U.S.C. §§ 922 and 924, and that under federal law a conviction supports recidivist enhancements even after it has been expunged by the rendering court. The 1986 legislation makes the effect of a conviction turn on state law—with the proviso that a pardon or restoration of rights removes the conviction for federal purposes, even if state law still would count it as a criminal conviction, "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." That's a federal anti-mousetrapping rule overlain on state law; a person told that his civil rights have been restored may assume that this means *all* rights unless he is informed that the right to vote (and so on) does not imply a right to carry firearms. See *United States v. Erwin*, 902 F.2d 510, 512-13 (7th Cir.1990). Logan has not been misled by any state act that apparently freed him from the legal consequences of his battery convictions.

When Congress replaced *Dickerson*'s uniform federal rule with a state definition of conviction, it ensured that similarly situated people would be treated differently—for states vary widely in which if any civil rights a convict loses and whether these rights are restored. Some states deprive almost all convicts of these rights but restore them automatically after a set period. See *Caron v. United States*, 524 U.S. 308, 313-14, 118 S.Ct. 2007, 141 L.Ed.2d 303 (1998) (agreeing with appellate consensus that restoration by operation of law has the same legal effect as restoration by act of personal clemency). Others take away fewer rights and make them harder to regain. The Office of the Pardon Attorney has compiled a list of these differences that conveys the flavor, though it may be out of date. U.S. Department of Justice, *Civil disabilities of convicted felons: a state-by-state survey* (1996), available at http://www.usdoj.gov/pardon/forms/state_survey.pdf. Vermont, for example, permits felons not only to vote from prison (they get absentee ballots) but also to

hold office, but not to serve on juries; New Hampshire permits them to serve on juries but not to vote until after release (and restoration then is automatic); other states take away all three rights (plus the right to carry firearms) and don't restore them except via executive clemency. Most states would call the batteries of which Logan was convicted felonies and deprive the offender of civil rights (for in most states the dividing line between misdemeanor and felony is a maximum term of one year's imprisonment). Wisconsin ordinarily puts the dividing line lower: misdemeanor sentences can't exceed nine months in a local jail, and any time at all in the state prison system depends on a felony conviction. Wis. Stat. § 939.60. Low sentences are accompanied by a rule that misdemeanants retain the right to vote. But even a misdemeanor conviction for battery by a repeat offender can carry a three-year sentence. See Wis. Stat. § 939.62, § 940.19(*l*). No reading of § 921(a)(20) could produce identical treatment (for purposes of federal recidivist prosecutions) of people who commit the same crimes in different states.

When the first circuit in *Indelicato* combined what it perceived as an infelicitous enactment with the absence of "We really mean it!" legislative history, it was nodding in the direction of imaginative reconstruction—the idea that a court may implement what it is sure the legislature would have done (had it faced the question explicitly) rather than what the legislature actually did. The Supreme Court has anathematized that approach as democratically illegitimate, for it sets up the judiciary as the effective lawmakers. See, e.g., *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-01, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) (calling imaginative reconstruction a "usurpation" that "profoundly mistakes [the judicial] role"); *Tafflin v. Levitt*, 493 U.S. 455, 461-62, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990) ("Petitioners . . . insist that if Congress had considered the issue, it would have [adopted a particular rule]. This argument . . . is

misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate"). This case illustrates the practical as well as the theoretical failings in that doctrine, for *Indelicato*'s guess about what Congress "would have done, had it thought" turns out to be wrong.

Section 922(g)(9) of the criminal code makes it unlawful for anyone "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm that is connected with interstate commerce. This section has a definitional provision corresponding to § 921(a)(20). That provision, 18 U.S.C. § 921(a)(33)(B)(ii), reads: "A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." This tracks § 921(a)(20) in treating expungement, pardon, or restoration of civil rights as canceling all effect of the conviction—but it shows that the "restoration of civil rights" clause is inapplicable to one whose civil rights were never taken away. For such persons, expungement and pardon are the only ways to regain the right to possess firearms. In other words, when Congress addressed this subject directly, it supported the second circuit's conclusion in *McGrath*, not the first circuit's prediction in *Indelicato*.

Defendants have argued that § 921(a)(33)(B)(ii) is itself absurd, and should not be applied as written, because (for example) the governor's pardon power in some states does not reach misdemeanor convictions. With one exception these arguments have been rejected, and courts have enforced this statute while noting, as *McGrath* had done for

§ 921(a)(20), that the differences in state rules can lead otherwise identical offenders to be treated differently under federal law. See *United States v. Jennings*, 323 F.3d 263, 267-69 (4th Cir. 2003); *United States v. Kirchoff*, 387 F.3d 748 (8th Cir. 2004); *United States v. Smith*, 171 F.3d 617, 624-26 (8th Cir. 1999); *United States v. Hancock*, 231 F.3d 557, 566-67 (9th Cir. 2000); *United States v. Barnes*, 295 F.3d 1354, 1368 (D.C. Cir. 2002).

The outlier is *United States v. Wegrzyn*, 305 F.3d 593 (6th Cir.2002). Persons convicted of domestic-violence misdemeanors in Michigan lose their right to vote only while incarcerated; it is restored automatically on release. Wegrzyn, who received a suspended sentence following his conviction, therefore did not lose any civil right. Without citing *McGrath, Indelicato*, or any of the earlier decisions under § 921(a)(33)—for that matter, without parsing the statutory language—the sixth circuit declared that it would be absurd to treat more harshly (under federal law) someone who received a suspended sentence in Michigan than someone who had gone to prison there (presumably for a more serious domestic battery); *Wegrzyn* refused to apply the federal statutes as enacted. This shows that even when Congress addresses a subject as directly as possible—for § 921(a)(33)(B)(ii) says point blank that people who were not deprived of their civil rights under state law differ from those whose rights were stripped and then restored—some judges still balk at applying what they find to be an unpalatable rule. *Wegrzyn*'s holding has been universally rejected by other courts that have addressed the identical question. In addition to *Jennings* and *Kirchoff*, see *United States v. Brailey*, 408 F.3d 609 (9th Cir.2005). Just as the fourth circuit's opinion in *Jennings* disparaged *Indelicato* to the extent its approach reflected on the best understanding of § 921(a)(33)(B)(ii), so we disapprove *Wegrzyn* to the extent its approach bears on the best understanding of § 921(a)(20). Both of these statutes create ample potential for disparate treatment, but that's inherent in

the legislative choice to make federal sentences depend on the states' different (and often internally inconsistent) approaches to revoking and restoring civil rights.

What a federal court *can* do, as a uniform matter, is count all state convictions unless the state extends a measure of forgiveness. The last sentence of § 921(a)(20) specifies how forgiveness is to be conveyed: pardon, expungement, or a restoration of civil rights. Logan's battery convictions did not qualify for the third means (though he *had* lost his civil rights in Wisconsin on account of his drug offense and never got them back) but potentially qualified for the first and second. So far as this record reveals, however, Logan never sought expungement or a pardon (and we know that, if he sought one, he did not obtain that boon). Wisconsin has neither forgiven him nor misled him about the (federal) consequences of his convictions, and as his convictions are serious enough to come within the federal definition of violent felonies they require sentencing as a recidivist under the Armed Career Criminal Act.

AFFIRMED.

No. 06-6911

IN THE

Supreme Court of the United States

JAMES D. LOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether the "civil rights restored" provision of 18 U.S.C. § 921(a)(20) applies to a conviction for which a defendant was not deprived of his civil rights thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

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OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 453 F.3d 804 (7th Cir. 2006) and is reproduced at JA 28-36.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was issued on July 6, 2006. Petitioner timely filed a Petition for Writ of Certiorari on September 29, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 921(a)(20) (2006)

(a) As used in this chapter –

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include –

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33)(B)(ii)

(a) As used in this chapter –

(33)(B)(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 922(g)(1) (2005)

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

18 U.S.C. § 922(g)(9)

(g) It shall be unlawful for any person –

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearms or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(1) (2006)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such

> person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(B)(i)

> (e)(2) As used in this subsection –
>
> > (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
> >
> > > (i) has an element the use, attempted use, or threatened use of physical force against the person of another . . . .

STATEMENT OF THE CASE

Congress passed the Firearm Owners' Protection Act ("FOPA")[1] to ensure that federal law respects state law determinations of what prior convictions subject persons to the federal firearm ban and increased penalties under the Armed Career Criminal Act (ACCA).[2] For example, ACCA's enhanced penalties do not apply when, under 18 U.S.C. § 921(a)(20), a state deems a person sufficiently trustworthy, despite a conviction, to exercise his civil rights to vote, sit on a jury, and to run for public office, and to possess a firearm. Petitioner James D. Logan was convicted as a felon in possession of a firearm and was sentenced to 15 years as an armed career criminal, despite the fact that his prior

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[1] Pub. L. No. 99-308, sec. 102, § 922, 100 Stat. 499, 451-53 (1986).

[2] 18 U.S.C. §§ 922(g)(1) (2005) and 924(e)(1) (2006) respectively.

convictions did not result in the loss of civil rights under Wisconsin law.

This case invites the Court to decide whether a state conviction which does not lead to a loss of civil rights satisfies the "exemption" provisions of section 921(a)(20). If it does, then Petitioner does not qualify as an armed career criminal; if it does not, then Petitioner's prior misdemeanor convictions would qualify and his subsequent arrest for possession of a firearm renders him an armed career criminal and subject to the 15 year mandatory minimum enhancement.

A. The District Court

Petitioner entered a guilty plea in the United States District Court for the Western District of Wisconsin to a violation of 18 U.S.C. § 922(g)(1) (felon in possession). This plea followed Petitioner's arrest on May 31, 2005, when law enforcement officers responded to a call at a residence in Janesville, Wisconsin. Petitioner consented to a search of his car and officers located a 9mm pistol in the glove compartment. His prior felony was a 1991 conviction for unlawful possession of a controlled substance.

The Probation Office prepared a presentence report in advance of sentencing. The report suggested that Petitioner qualified as an armed career criminal under § 924(e)(1), based upon three prior misdemeanor convictions for battery in Wisconsin.[3] Under Wisconsin law, the maximum penalties for each of these prior offenses was increased from nine months to three years because Petitioner was considered a repeat offender.[4] The report noted that under 18 U.S.C. § 921(a)(20), state law misdemeanors punishable by more than two years are counted as felonies for the purpose of federal firearms law. Petitioner was convicted for these misdemeanors on December 14, 1988, February 15, 1988, and

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[3] Wis. Stat. § 940.19(1) (2003).

[4] Wis. Stat. § 939.62(1)(a) (2000).

March 6, 2001.[5] Under Wisconsin law, and even under the repeater enhancements, misdemeanor convictions do not result in the loss of any civil rights or the right to possess a firearm.[6]

At Petitioner's sentencing, the District Court adopted the Probation Office's determination that Petitioner's prior convictions qualified him for the ACCA enhancement. The District Court refused to apply the exemption provisions, reasoning that an offender who never lost civil rights cannot have civil rights restored. JA 29. If the District Court had applied the exemption, Petitioner would have been subject to a statutory maximum term of imprisonment of 120 months, 18 U.S.C. § 924(a)(2), and his guideline range under the United States Sentencing Guidelines § 2K2.1 (Nov. 2005) would have been 37-46 months. JA 16.

B. The Court Of Appeals

The United States Court of Appeals for the Seventh Circuit affirmed. Prior to the Seventh Circuit's decision, only two circuit courts had addressed the scope of the exemption clause of § 921(a)(20) in this context. See *United States* v. *Indelicato*, 97 F.3d 627, 630 (1st Cir. 1996) (holding that convictions for which civil rights were retained satisfy the exemption clause); *McGrath* v. *United States*, 60 F.3d 1005, 1009 (2d Cir. 1995) (holding that convictions for which civil rights were retained do not satisfy the exemption clause). Petitioner argued in the Seventh Circuit that civil rights that were retained after a conviction must be included within the "civil rights restored" provision of the exemption clause

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[5] The Court of Appeals for the Seventh Circuit found that he was also convicted of one concededly qualifying felony, but that 1991 conviction was for unlawful possession of a controlled substance, so it would not be a "serious drug felony" for enhanced sentencing under the Armed Career Criminal Act. *See* 18 U.S.C. § 924(e)(2)(A)(ii) (2006).

[6] *See* Wis. Stat. § 6.03(1)(b) (2006); Wis. Const. Art. 13 § 3(2) (1996); Wis. Stat. § 756.02 (1997); *id.* § 973.176(1) (2006).

because the proper inquiry is whether the person may exercise civil rights regardless of whether rights were lost and regained or simply retained.

The Seventh Circuit adopted the District Court's reasoning in holding that "[t]he word 'restore' means to give back something that had been taken away . . . the 'restoration' of a thing never lost or diminished is a definitional impossibility." JA 29 (citing *McGrath*, 60 F.3d at 1007). In response to Petitioner's argument that this interpretation of the statute produced an absurd result, the Court of Appeals declared that because the text of the exemption clause "parses; there is no linguistic garble," the absurdity canon did not apply. Further, it declared that the canon "is limited to solving problems in exposition, as opposed to the harshness that a well-written but poorly conceived statute may produce." *Id.* at 30. Finally, the Court of Appeals examined several circuit cases involving 18 U.S.C. § 921(a)(33)(B)(ii), which defines what qualifies as a conviction for purposes of 18 U.S.C. § 922(g)(9).[7]

Section 921(a)(33)(B)(ii) contains language identical to that of § 921(a)(20), but for a parenthetical that specifically excludes convictions for which civil rights were never lost. The Court of Appeals concluded that in the context of § 921(a)(33)(B)(ii), when Congress addressed this subject directly, it addressed this issue in a manner contrary to Petitioner's interpretation by including the parenthetical. JA 34. While the Court of Appeals acknowledged the likelihood of disparate treatment of similarly situated defendants would result from its holding, it accepted that result as inherent in Congress' choice to base the statute on state law. *Id.* at 35-36. It concluded: "What a federal court *can* do, as a uniform matter, is count all state convictions unless the state extends a measure of forgiveness." *Id.* at 36 (emphasis in original).

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[7] Section 922(g)(9) allows for prosecution in federal court for possession of a firearm subsequent to a conviction for a misdemeanor crime of domestic violence.

SUMMARY OF THE ARGUMENT

FOPA's structure, purpose and history, and this Court's precedents, strongly support Petitioner's reading of § 921(a)(20) to exempt convictions where civil rights were retained, as well as lost and restored, from the ACCA's reach. FOPA gives great deference to state determinations of trustworthiness, as Congress' interaction with the Court on this issue vividly illustrates. In *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103 (1983), *superseded on other grounds by statute*, 18 U.S.C. § 922, *as recognized in Caron* v. *United States*, 524 U.S. 308 (1998), this Court held that a state expungement did not erase a conviction for purposes of serving as a predicate offense for § 922(g)(1). In 1986, Congress enacted the Firearm Owners' Protection Act (FOPA) intending, *inter alia*, to negate the result of *Dickerson*. FOPA therefore, gives effect to a state's determination that, despite a conviction, a person is trustworthy enough to be free from the federal law. This inquiry is satisfied if the state determines that the individual evinces a modicum of trustworthiness as evidenced by an expungement, set aside, pardon, or restoration of civil rights as to that conviction, and that it did not prohibit firearm possession. See 18 U.S.C. § 921(a)(20). A sensible reading of the statute requires that the term "civil rights restored" must include not only rights that were taken away upon conviction and subsequently regained, but rights that were never taken away upon conviction.

This Court recognized that state-based indications of trustworthiness were the guiding interpretive principle for § 921(a)(20) in *Caron* v. *United States*, 524 U.S. 308, 316-17 (1998). There, the Court held that Massachusetts did not treat Caron as trustworthy because even though his civil rights were restored,[8] his right to possess a firearm was not

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[8] Massachusetts only restored two of Caron's civil rights – his right to vote was retained subsequent to his conviction.

unqualified – he was not allowed to possess handguns outside of his home. *Caron* also observed that a restoration of civil rights can occur on a case-by-case basis or by operation of law. *Id.* at 313-14.

If, as *Caron* suggests, the process by which civil rights are regained is inconsequential, then the process by which a person obtains his civil rights is also not of consequence. There is no meaningful distinction between rights that were regained through operation of law and rights that are retained by operation of law subsequent to conviction. If there were a meaningful distinction between rights regained and rights retained, all civil rights would need to be regained to qualify for the exemption in § 921(a)(20). But the government conceded and this Court acknowledged in *Caron* that Caron's civil rights had been "restored" even though his right to vote had never been taken away. Rather, the focus of the statute with regard to civil rights is whether the individual possesses all three civil rights subsequent to conviction. If all three rights are possessed, FOPA's trustworthiness inquiry is satisfied, so long as the convicting state did not specifically restrict the individual's firearms rights.

Congress specifically structured FOPA to broaden the exemptions to the definition of a "felony" under the federal gun statutes in order to give full effect to a state's determination whether a particular conviction is of the sort that should restrict an individual's right to possess a firearm. This, in turn, narrowed the prosecutorial reach of § 922(g)(1) (felon in possession of a firearm) as fewer convictions would qualify as a "crime punishable by more than a year." In contrast, the Seventh Circuit's interpretation expands the prosecutorial reach of § 922(g)(1) and the possibility of enhanced penalties under 18 U.S.C. § 924(e). Refusing to exempt convictions for which no civil rights were lost, applies the statute in a way contrary to Congress' expressed desire to respect a state's trustworthiness decision. Indeed, the statute and legislative history are absolutely silent

regarding the possibility of including convictions where civil rights were retained following an otherwise qualifying conviction. In such circumstances, the Court must interpret the language to avoid the unintended result.

When § 921(a)(20) is read in light of the related statutory provisions, it is clear that under the proper reading of the statute, "civil rights restored" includes convictions where civil rights were never lost. Petitioner's reading is supported by the language of two related firearms provisions: 18 U.S.C. §§ 921(a)(33) and 925(c). The language of § 921(a)(33) is almost identical to § 921(a)(20). While § 921(a)(20) applies to felons, § 921(a)(33) applies to persons convicted of misdemeanor domestic violence crimes. The only difference in § 921(a)(33) is that the enumerated exemptions (pardon, expungement, restoration of civil rights) only apply "if the law of the applicable jurisdiction provides for the loss of civil rights under such offense." Thus, § 921(a)(33) explicitly excludes from the exemption individuals who never lost their civil rights. This language in § 921(a)(33) must be given some effect; it must be differentiated from § 921(a)(20). If "civil rights restored" only includes situations where rights are lost to begin with, the extra language in § 921(a)(33) would be superfluous. Section 925(c) sets forth the process by which an individual who is prohibited from possessing a firearm under federal law can get relief from federal disability.[9] Section 925(c) further demonstrates that trustworthiness inquiry is the touchstone for determining who should be exempt from federal firearm prohibitions.

Petitioner's reading of the statute is "a sensible construction" that avoids "an unjust or absurd conclusion." *United States* v. *Granderson*, 511 U.S. 39, 56 (1994). Felons in Wisconsin are in a better position than Petitioner because for felons, the rights to vote and serve on a jury are restored

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[9] 18 U.S.C. § 925(c), however, is an unfunded mandate and currently, relief under § 925(c) is unattainable.

automatically and the right to hold public office and the right to possess a firearm can be restored through a pardon. Meanwhile, Petitioner is left with no remedy as pardons and expungement are not available to misdemeanants in Wisconsin. No sound reasoning supports such disparate treatment.

Finally, if this Court is to choose between interpretations of § 921(a)(20), under the rule of lenity, the Court should reject the Seventh Circuit's. The Seventh Circuit's interpretation imposes a substantial risk of enhanced penalties upon persons who might reasonably consider their past crimes not to be grave transgressions in light of their state's determination that they should retain and enjoy all of their civil rights. Imposition of a 15-year mandatory minimum sentence ought only to occur when Congress has plainly and unequivocally said it should be so, in a fashion that gives fair warning to persons whose prior crimes included only misdemeanors for which they never lost their civil rights.

ARGUMENT

I. A SENSIBLE READING OF § 921(a)(20) IN LIGHT OF THIS COURT'S PRECEDENTS REQUIRES INCLUDING CONVICTIONS FOR WHICH CIVIL RIGHTS WERE RETAINED WITHIN THE "CIVIL RIGHTS RESTORED" EXEMPTION.

Rarely is the Court confronted with such clear development of a statute as it is here. Congress explicitly structured The Firearms Owners' Protection Act ("FOPA"), Pub. L. No. 99-308, sec. 102, § 922, 100 Stat. 449, 451-53 (1986) to ensure that federal law respects state law determinations of what prior convictions subject persons to the federal firearm ban and increased penalties. A sensible reading of FOPA, as supported by this Court's rulings, requires that if, despite a conviction, a state determined that a person is trustworthy enough to exercise his civil rights and an unqualified right to possess a firearm under its laws, then the federal statute gives

effect to that determination insofar as that conviction cannot be considered a qualifying prior conviction under ACCA.

FOPA amended 18 U.S.C. § 921(a)(20) to provide the following definition of a qualifying prior conviction:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include –
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

FOPA sec. 101, § 921, 100 Stat. at 449-50. The second-to-last sentence is referred to as the "choice-of-law" clause. The first part of the last sentence is known as the "exemption clause," while the second part of the last sentence pertaining to whether a state has explicitly banned a person from possessing a firearm is known as the "unless clause." *Beecham* v. *United States*, 511 U.S. 368, 369 (1994); *Caron*, 524 U.S. at 312.

Prior to FOPA's enactment, this Court had decided that whether a conviction qualified as a "crime punishable by imprisonment for a term exceeding one year" was determined by federal, not state, law. *Dickerson*, 460 U.S. at 106. This

Court held that a conviction expunged by a state still counted as a conviction for purposes of federal firearms law because "expunction under state law does not alter the historical fact of the conviction." *Id.* at 115. Congress subsequently enacted FOPA with the express intent of avoiding the holding of *Dickerson* by making the "convicted felon" status dependent upon state law. S. Rep. No. 98-583 observed in a footnote:

> For instance the Supreme Court, in *Dickerson* construed this definition to include guilty pleas where no final judgment had been rendered by the Court. S. 914, as reported, would leave such a determination to the states and would render the *Dickerson* decision inapposite where individual State courts or legislatures have decided to the contrary.

S. Rep. No. 98-583, at 7 n.16 (1984).

The choice-of-law clause's purpose is axiomatic: "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." § 921(a)(20). As the Court later noted, it logically follows that the law of the state of conviction controls the exemption clause. *Beecham*, 511 U.S. at 371 ("[A]sking whether a person has had civil rights restored is thus just one step in determining whether something should 'be considered a conviction.' By the terms of the choice-of-law clause, this determination is governed by the law of the convicting jurisdiction").

The exemption clause requires a court to determine whether the state of conviction has granted a person a pardon, expungement, set aside, or has restored the convicted person's civil rights with regard to the prior conviction at issue. Congress required district courts to assess whether the state had given some indication that, despite a conviction, the person was trustworthy. As relevant here, Congress chose the status of civil rights following a conviction as a barometer for

a state's determination of trustworthiness. Because the choice-of-law clause controls the exemption clause, state law determines the restoration of civil rights.[10] *Caron*, 524 U.S. at 318 (agreeing with majority in recognizing that the "primacy of state law in the statutory scheme" requires that "whether a prior state conviction qualifies as a violent felony conviction under § 924(e) turns entirely on state law") (Thomas, J., dissenting). Indeed, FOPA's "Findings" section makes clear Congress' purpose in enacting the legislation was in part to not "place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms." FOPA § 1(b)(D)(2), 100 Stat. at 449. Certainly, the most concrete indicia of a trustworthy citizen, even one who has been convicted of a misdemeanor, is one whom the state allows to participate fully in civic life.

If a person satisfies the exemption clause, he must also satisfy the unless clause. The unless clause dictates that, even if a state pardons, expunges, sets aside, or restores a person's civil rights, the federal ban still applies if the state specifically bans that person from possessing firearms. If a conviction satisfies both the exemption clause and the unless clause, the state's treatment of the individual as trustworthy is acknowledged by the federal statute; and the individual will be exempt from prosecution or increased penalties under federal law. In short, trustworthiness is the touchstone of the

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[10] Although Congress did not define "civil rights" in the statute, a defendant's "civil rights" are widely accepted to include that person's right to vote, hold public office, and serve on a jury. *Caron*, 524 U.S. at 313 (commenting that the parties agreed that Massachusetts had restored Caron's civil rights); *United States* v. *Caron*, 77 F.3d 1, 2 (1st Cir. 1996) (en banc) (stating that "'[c]ivil rights,' within the meaning of § 921(a)(20), have been generally agreed to comprise the right to vote, the right to seek and hold public office, and the right to serve on a jury," and confirming that Massachusetts had restored Caron's right to hold public office and juror service, while he retained his right to vote) (citing *United States* v. *Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990)).

exemption clause. *Indelicato*, 97 F.3d at 630 ("[t]o key the federal statute to these civil rights makes sense only on one assumption: that Congress thought of the attribution of these rights as expressing 'a state's judgment that a particular person or class of persons is, despite a prior conviction, sufficiently trustworthy to possess firearms'" (quoting *McGrath*, 60 F.3d at 1009 (2d Cir. 1995)); see *e.g.*, *Caron*, 524 U.S. at 315-17.[11]

The Court's decision in *Caron* addresses the trustworthiness principle in the context of the unless clause. The defendant in *Caron* was a convicted felon. Massachusetts restored two of Caron's civil rights, while he retained one throughout. Under Massachusetts law, he was allowed to possess certain firearms, but his conviction precluded him from possessing handguns outside his home. *Caron*, 524 U.S. at 311-12. The Court held that when a state even partially bans firearm possession, the unless clause operates as a complete federal ban. *Id.* at 316. The Court found that because Massachusetts treated Caron as not trustworthy enough to possess all firearms, federal law forbids him from possessing any firearm. *Id.* at 316-17. Thus, the holding in *Caron* was that a state's determination that a person is trustworthy enough to possess a firearm must be unqualified in order for that person's conviction to be exempt under § 921(a)(20). Otherwise, a state's partial ban on handguns is interpreted by the federal statute as that state's finding of dangerousness or untrustworthiness. *Id.*

The Court's opinion in *Caron* further emphasizes that the process by which a person's status is achieved is irrelevant to the trustworthiness inquiry:

> Nothing in the text of § 921(a)(20) requires a case-by-case decision to restore civil rights to this particular

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[11] *See also* 18 U.S.C. § 925(c), which examines a person's trustworthiness for federal exemption. For further discussion *see infra* at Section III.

> offender. While the term "pardon" connotes a case-by-case determination, "restoration of civil rights" does not. Massachusetts has chosen a broad rule to govern this situation, and federal law gives effect to its rule. All Courts of Appeals to address the point agree.

Id. at 313-14 (citations omitted). Thus, an affirmative act of forgiveness such as a pardon is no different from, for example, an automatic statutory restoration of civil rights upon completion of a sentence. It logically follows from the Court's recognition in *Caron* that if process is not of import, then there can be no meaningful difference between rights that were *regained* through operation of law versus rights that are *retained* through operation of law. Both are means to the same end. If anything, when civil rights are retained by broad legislative determination, it is a state's ultimate expression of trustworthiness in that the state legislature has plainly indicated that *no* person who has committed this crime ought to lose his or her civil rights.

The circumstances present in *Caron* with respect to the status of the defendant's civil rights further demonstrate that retention and restoration are indistinguishable for purposes of the exemption clause. In *Caron*, the government agreed, and this Court acknowledged, that the defendant's civil rights had been "restored" even though the status of Caron's civil rights was really a mix of rights restored and retained. Two of Caron's rights were restored by operation of statute and he had retained his right to vote all along. *Id.* at 313 ("[a]side from the unless clause, the parties agree Massachusetts law has restored petitioner's civil rights"). Neither the Court nor the government recognized any distinction among civil rights restored or retained in determining the applicability of the unless clause. The same analysis should hold true for the exemption clause. Accordingly, for purposes of the statute, restoration occurs when fewer than all three civil rights are restored. "Civil rights restored" therefore must mean that *any civil rights taken away have been restored.* It follows then, *a*

fortiori, that the result is the same where all three rights were retained. It is immaterial whether one, two, or all three civil rights were retained, so long as all three are possessed by a person following a conviction.[12]

II. EXCLUDING FROM THE EXEMPTION CLAUSE CIVIL RIGHTS RETAINED IS DIRECTLY CONTRARY TO THE PURPOSE OF FOPA.

Congress specifically structured FOPA to broaden the exemption clause and give full effect to a state's determination that a particular conviction is not serious enough to warrant subjecting the person to prosecution and increased penalties under the federal statute.[13] This, in turn,

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[12] In at least ten states, a convicted person retains either the right to sit on a jury (*e.g.*, Colorado, Illinois, Iowa, New Hampshire, Tennessee, Maine) or the right to hold public office (*e.g.*, Michigan, New Jersey, New York, Texas, Utah, Vermont). Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* app. B (2006). Additionally, in at least thirteen states and the District of Columbia, a person loses the right to vote only if that person is incarcerated (*e.g.*, California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Oregon, and Utah). *Id.* at 85-95, 135-39. For updated information see generally FAMM/NACDL *Amicus* Br.

[13] Senate Report 98-583 explains FOPA's deference to state determinations as follows:

> Third, it requires that a 'conviction' must be determined in accordance with the law of the jurisdiction where the underlying proceeding was held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period, or which create 'open-ended' offenses, conviction for which may be treated as misdemeanor or felony at the option of the court. Since the Federal prohibition is keyed to the state's conviction, state law should govern in these matters.

S. Rep. No. 98-583, at 7.

Further, in explaining the broadening effect of the exemption clause, the report continues:

narrowed the prosecutorial reach of §§ 922(g)(1) and 924(e), as fewer convictions qualified as "a crime punishable by more than a year." Refusing to exempt convictions for which no civil rights were lost produces unacceptable results because it ignores a state's trustworthiness determination, thereby applying the statute in a way Congress clearly did not intend. An interpretation of a statute cannot stand when "the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters'" and "so bizarre that Congress 'could not have intended' it." *Demarest* v. *Manspeaker*, 498 U.S. 184, 190-91 (1991).

Congress simply did not consider the possibility of persons who never lost their civil rights upon an otherwise qualifying conviction. See Nat'l Rifle Ass'n of Am. *Amici* Br. at 16-26. In such circumstances the Court may interpret the language to avoid the unintended result. *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (departing from the plain language is permissible when the history of a statute reveals that an unthinkable result was indeed unthought of). The history of the exemption clause reveals that Congress focused upon situations where, following a conviction, a person lost his civil rights but then later had them restored. The legislative history is replete with references to pardons, expungement, and restoration of civil rights. The statute and the legislative history are absolutely silent, however, as to situations like Petitioner's where civil

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Finally, S. 914 would exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision with respect to pardons in 18 U.S.C. app. 1202, relating to possession of firearms, but through oversight does not include any conforming provision in 18 U.S.C. 922, dealing with their purchase or receipt. This oversight, which resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision in the pardon that he may posses it, be corrected.

Id.

rights were retained despite the crime being punishable by more than two years, thereby falling outside of the purview of § 921(a)(20)(B). Section 921(a)(20) mostly concerns felonies. Under federal law, the language used in §§ 922(g)(1) and 924(e)(1) is the same language that defines "felony" in 18 U.S.C. § 1(1). In § 921(a)(20), Congress endeavored to redefine "felony" for the purpose of the gun statutes. While it includes certain serious misdemeanors punishable by more than two years as felonies, Congress presupposed that convictions for any of those crimes would result in the loss of civil rights; it did not contemplate situations where misdemeanors would be punishable by more than two years, but civil rights would not be lost.

Excluding these overlooked convictions from the exemption clause results in application of the statute beyond its original purpose. In a similar circumstance, this Court has refused to interpret the federal firearms statute in a manner that assumes Congress intended to expand liability where it is plain that the situation presented was never considered by Congress. In *Small* v. *United States*, 544 U.S. 385, 393 (2005), the Court found that "Congress did not consider" the inclusion of foreign convictions as predicate offenses for § 922(g)(1) when it used the phrase "convicted in any court." *Id.* at 392. The statute was silent as to whether foreign convictions counted. "If 'convicted in any court' refers only to domestic convictions, this language creates no problem." *Id.* This is true because certain domestic convictions fit within the exemption in § 921(a)(20), which specifies that certain "state or federal" convictions may be exempt. However, foreign convictions would not be exempt because the statute made no mention of them. After reviewing the language of the provisions and the legislative history, the Court concluded: "We have no reason to believe that Congress considered the added enforcement advantages flowing from inclusion of foreign crimes, weighing them

against, say, the potential unfairness of preventing those with inapt foreign convictions from possessing guns." *Id.* at 394.

Similarly, there is no reason to believe Congress considered in any fashion the utility or disutility of using convictions for which civil rights were retained as predicate convictions. In fact, Congress was explicit in passing FOPA that the Court's broad interpretation in *Dickerson* of what qualified as a prior conviction was to be avoided. Surely then, Congress would not have intended to exclude from the exemption clause convictions for which a state arguably deems an individual more trustworthy (by allowing him to retain his civil rights despite the conviction) while exempting convictions for which a state determined the person is untrustworthy enough to initially revoke his rights, but later restore them.[14]

III. THE SURROUNDING STATUTORY PROVISIONS SUPPORT THE READING THAT "CIVIL RIGHTS RESTORED" INCLUDES CONVICTIONS FOR WHICH CIVIL RIGHTS WERE NEVER LOST.

Related statutory provisions reveal that "civil rights restored" concerns the trustworthiness of an individual as determined by the status of that individual's civil rights; not by the mechanism by which those rights are retained or regained.

The meaning of statutory language, plain or not, depends on context. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (citing *King* v. *St. Vincent's*, 502 U.S. 215, 220-21, n.9

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[14] Instead, FOPA requires that the exemption clause must be interpreted broadly to include persons deemed trustworthy by the state as evidenced by the state allowing those persons to retain civil rights despite a conviction: "additional legislation [FOPA] is required to reaffirm the intent of the Congress . . . that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." FOPA § 1(b)(D)(2), 100 Stat. at 449 (quotation marks omitted).

(1991)). What the Court "seek[s] to discern is the plain meaning of the whole statute, not of isolated sentences." *Beecham*, 511 U.S. at 372. See also *Robinson* v. *Shell Oil, Co.*, 519 U.S. 337, 341 (1997) (stating that proper analysis should include not only the language itself, but also . . . its context within the "statute as a whole"). The Court must look beyond the definition of words in isolation, and consider the whole statutory text, the purpose and context of the statute, and consult any precedents or authorities that inform the analysis. *Dolan* v. *USPS*, 126 S. Ct. 1252, 1257 (2006).

First, a similar statute provides an enlightening contrast. In 1996, Congress amended § 922(g)(9) to read in relevant part:

> It shall be unlawful for any person – who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess in or affecting commerce, any firearm.

Section 921(a)(33) defines predicate offenses for § 922(g)(9) just as § 921(a)(20) defines predicates for § 922(g)(1). Section 921(a)(33)(A) defines what qualifies as a "misdemeanor crime of domestic violence." Paragraph (B)(ii) provides the exemptions:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (*if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense*) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms

§ 921(a)(33)(B)(ii) (emphasis added). This language is identical to § 921(a)(20) ("(a)(20)") with one meaningful difference: section 921(a)(33)(B)(ii) ("(a)(33)") expressly provides that the exemption only applies "if the law of the

applicable jurisdiction provides for the loss of civil rights under such an offense." Thus, it specifically excludes from the exemption individuals who never lost their civil rights.

The Seventh Circuit seized on this similarity, but misconstrued the importance of the differing language. It concluded that Congress intended (a)(20), written ten years earlier, to have the same meaning as (a)(33). The Seventh Circuit's conclusion flatly contradicts the rules of statutory interpretation.

Differing language within the same statute should yield different results. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452-54 (2002) ("[w]e refrain from concluding here that the differing language in the two subsections has the same meaning in each . . . [w]here Congress wanted to provide for successor liability in the . . . Act, it did so explicitly"). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) (alteration in original). "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citations omitted).

In (a)(33), when Congress wanted to exclude convictions for which civil rights were retained from exemption, it did so explicitly. While the exemption clause in (a)(33) was enacted by a different Congress some ten years after FOPA, Congress was cognizant of the language in (a)(20) to the point that, except for the parenthetical language, it wrote the exemption verbatim. Thus, where Congress wanted to explicitly exclude from an exemption convictions for which civil rights were never lost, it did. It did not, however, amend (a)(20) to conform to the new language of (a)(33), even though it had the opportunity to do so, and despite numerous circuit court

decisions having already interpreted the provision contrary to the Seventh Circuit. See, *e.g.*, *United States* v. *Thomas*, 991 F.2d 206, 212 (5th Cir. 1993); *United States* v. *Cassidy*, 899 F.2d 543, 549 n.13 (6th Cir. 1990); *United States* v. *Hall*, 20 F.3d 1066, 1069 (10th Cir. 1994) (stating that if Congress intended to exclude rights retained it "would (and easily could) have been more explicit"). Knowledge of these interpretations of (a)(20) is imputed to Congress. See *Cannon* v. *University of Chi.*, 441 U.S. 677, 697-99 (1979). Indeed, the fact that Congress found it necessary to insert the parenthetical language shows that the drafters of § 921(a)(33) were aware that "civil rights restored" could include persons whose civil rights were never taken away. Plainly, where Congress wanted to narrow the exemption provision to encompass only offenders whose civil rights were restored, it knew how to do so.

The parenthetical language in the (a)(33) exemption must be given some effect. Otherwise, if the exemption in (a)(20) is given the same meaning as the exemption in (a)(33), the parenthetical language in (a)(33) is superfluous and void. See *Bates*, 522 U.S. at 29-30. This would subvert Congress' efforts in passing the provision as it authored. The Court should, as it did in *Sigmon Coal*, 534 U.S. at 454, "refrain from concluding here that the differing language in the two subsections has the same meaning in each."

Section 925(c) also supports the conclusion that trustworthiness, and a focus on the status of an individual's civil rights (not whether they happened to be taken away and restored), is the touchstone for who should be exempt from firearm disabilities and increased penalties. It sets forth the process by which an individual who is prohibited from possessing a firearm by way of federal law can get relief from the federal disability. The Attorney General may grant such relief to an applicant if "the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety." 18 U.S.C. § 925(c). With the

statute's focus on record, reputation, and likely future civility, this provision squarely addresses a person's trustworthiness with respect to possessing a firearm. It is analogous to the inquiry in § 921(a)(20) as to whether a state has deemed an individual trustworthy enough to possess his civil rights.[15]

In sum, when § 921(a)(20) is read in the context of the surrounding statutory provisions, the only sensible reading that emerges is that convictions for which a person retains his civil rights, whether taken away and later restored, or never taken away in the first place, should be exempt from prosecution under § 922(g)(1) and the 15-year mandatory minimum of § 924(e)(1).

IV. INCLUDING CIVIL RIGHTS RETAINED IN THE EXEMPTION CLAUSE AVOIDS AN ABSURD RESULT.

In enacting FOPA, Congress structured the statute to give full effect to a state's determination that a person, despite a criminal conviction, is trustworthy. To exclude convictions for which civil rights were retained, as the Seventh Circuit has done, ignores this fundamental inquiry in favor of a mechanical federal test that requires the state to revoke civil rights and later restore them. This mechanical test produces

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[15] Section 925(c) is not, however, a practical solution to the problem presented here; namely a means by which persons like Petitioner may seek a federal "restoration" even though they retained their right to possess firearms under state law. In *United States* v. *Bean*, 537 U.S. 71 (2002), this Court held that in the absence of an actual denial by the ATF of a felon's petition precludes judicial review under § 925(c). In reaching its conclusion, the Court acknowledged that "Since 1992 . . . the appropriations bar has prevented ATF, to which the Secretary has delegated authority to act on § 925(c) applications, from using 'funds appropriated herein . . . to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. [§] 925(c).'" *Id.* at 74-75 (second omission in original). So, while § 925(c) is instructive on the trustworthiness inquiry, it is not a means by which the void in the exemption clause of § 921(a)(20) is filled.

results that directly contradict the purpose of FOPA, and which offend the societal norm of treating less serious offenders accordingly, and is plainly irrational and unjust.

The absurd results arising from the Seventh Circuit's interpretation of the exemption clause militate strongly against its adoption. In contrast, if the exemption clause includes convictions for which civil rights were retained, then the exemption clause simply gives full effect to state determinations of trustworthiness, which is consistent both with the manifest purpose of FOPA and this Court's understanding of that purpose. Petitioner's interpretation also naturally extends this Court's acknowledgment in *Caron*, that if the process by which civil rights are restored is irrelevant then so too is the process by which civil rights are attained. Moreover, it avoids attributing to Congress a purposeful contemplation of exposing offenders with less serious convictions to a 15-year mandatory minimum.

A. The Court Must Avoid Absurd Results.

Generally, when interpreting a statute, the Court must choose "'a sensible construction' that avoids attributing to the legislature either 'an unjust or an absurd conclusion.'" *Granderson*, 511 U.S. at 56 (finding the plain meaning of the statute as absurd because it would result in the revocation of Granderson's 60-month term of probation in favor of a sentence of 20 months' probation) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)). "[I]t is a venerable principle that a law will not be interpreted to produce absurd results." *K-Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 325 n.2 (1988) (Scalia, J., concurring in part and dissenting in part). "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence." *United States* v. *Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868).[16] This

[16] "The common sense of man approves the judgment mentioned by *Puffendorf*, that the Bolognian law which enacted 'that whoever drew

principle applies with equal force to a statute written with clear language. *K-Mart Corp.*, 486 U.S. at 325 n.2 (Scalia, J., concurring in part and dissenting in part); *Clinton* v. *City of N.Y.*, 524 U.S. 417, 429 (1998) (expanding the word "individual" in 2 U.S.C. § 692(a)(1) to include corporations and other entities . . . to avoid "an absurd and unjust result which Congress could not have intended") (quotation marks omitted); *Caron*, 524 U.S. at 315.

In other words, "[w]here the plain language of the statute would lead to 'patently absurd consequences,' that 'Congress could not possibly have intended,' we need not apply the language in such a fashion . . ." a statute is absurd "where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 470-71 (1989) (internal citations omitted) (Kennedy, J., concurring). Regardless of how the Court has articulated the principle, it is a long-standing one, and ultimately concerns the results of a statute that can objectively be seen as absurd and unjust. See *Bock Laundry*, 490 U.S. at 509-10. The Seventh Circuit's interpretation of § 921(a)(20) produces precisely such results.[17]

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lood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by *Plowden*, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire – 'for he is not to be hanged because he would not stay to be burnt.'" *K-Mart Corp.*, 486 U.S. at 325 n.2 (quoting *Kirby*, 74 U.S. (7 Wall.) at 487) (Scalia, J., concurring in part and dissenting in part) (concurring in Court's interpretation of statute, "not . . . because of ambiguity" in the law, but because "a law will not be interpreted to produce absurd results.")

[17] The Seventh Circuit rejected Petitioner's absurdity argument and stated that the anti-absurdity canon is linguistic rather than substantive. JA 30 (citing *Jaskolski* v. *Daniels*, 427 F.3d 456, 462-64 (7th Cir. 2005)). The Seventh Circuit offered no real support for that notion. In fact, it is

B. The Seventh Circuit's Interpretation Is Absurd Because It Would Treat Persons Convicted Of Less Serious Offenses The Same Or Worse Than Persons Convicted Of More Serious Offenses.

The Seventh Circuit's application of the statute leads to unjust and patently absurd results. Petitioner was convicted of three misdemeanor batteries that were punishable by more than two years. As of February 1, 2003, the same misdemeanors of which Petitioner was convicted are punishable by only two years.[18] Therefore, a person who was sentenced on or after February 1, 2003, for a battery as a repeater is now fully exempt from the federal ban and increased penalties under § 921(a)(20)(B). Each person has the same rights under Wisconsin law, but under the Seventh Circuit's interpretation, the later-convicted person would risk no additional liability, while someone like Petitioner would be subject to a fifteen-year mandatory minimum. Wisconsin law provides that, without qualification, a person in Petitioner's position is sufficiently trustworthy to retain the right to vote, hold public office, serve on a jury, and possess a

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well-settled that the inquiry under the absurdity canon is whether the result of applying the statute as written is absurd, not whether the exposition of language itself is absurd. Rather, this Court articulates the inquiry as "[w]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)).

For well over a hundred years this Court has treated the absurdity doctrine as substantive because it looks at the disposition of the language. *See Kirby*, 74 U.S. (7 Wall.) at 486-87 (1868). Under the Seventh Circuit's exposition analysis, the venerable examples of the surgeon drawing blood in the street and the prisoner escaping the fire would be out of luck because the text of the laws were not linguistically absurd.

[18] *See* Wis. Stat. § 939.62(1)(a) (2001), *amended by* Wis. Act. 109 (S.B. 1), § 562 (eff. Feb. 1, 2003).

firearm under Wisconsin law,[19] and the federal statute must give effect to Wisconsin's judgment.

Moreover, despite Wisconsin's unqualified repose of trust in persons in Petitioner's position, the Seventh Circuit's interpretation also treats Petitioner as harshly as felons in Wisconsin. Under Wisconsin law, felons lose all three civil rights, two of which are automatically restored, while the right to hold public office is not. This last right can be restored through a pardon, thus satisfying the exemption clause. A Wisconsin felon also loses the right to possess a firearm but may have it restored by pardon as well.[20]

Unlike felons, misdemeanants in Wisconsin would have no way to satisfy § 921(a)(20)'s exemption clause under the Seventh Circuit's interpretation. This is because pardons are generally unavailable to misdemeanants, see State of Wisconsin Office of the Governor, Executive Clemency, ("Pardons, commutations and reprieves are available for felonies only, not misdemeanors," which may be waived only if an applicant can "demonstrate that there are extraordinary circumstances showing that you should be eligible to apply even though you seek executive clemency for a misdemeanor"),[21] expungement is not available to those convicted of a misdemeanor as an adult, Wis. Stat. § 973.015, and Wisconsin has no "set aside" procedure.[22] The Seventh

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[19] *See* Wis. Stat. § 6.03(1)(b); Wis. Const. Art. 13, § 3(2); Wis. Stat. § 756.02; *id.* § 973.176(1)

[20] *See* Wis. Stat. § 941.29(5)

[21] *Available at* http://www.wi-doc.com/index_adult.htm.

[22] Wisconsin takes the common sense view that when a person does not lose rights, he need not have them restored in order to avoid a state-imposed disability. *See, e.g.*, Wis. Stat. § 304.078(2); *id.* § 973.09(5); Note, 1998 Wis. Legis. Serv. Act 289 (1997 A.B. 747) (WEST) ("certificate of discharge" is required as evidence that the "person is restored to his or her civil rights" when a felon is discharged from probation, but not when a misdemeanant is discharged from probation,

Circuit's mechanical reading of "civil rights restored" thus creates an unavoidable lifetime prohibition against possessing firearms for certain Wisconsin misdemeanants, regardless of the fact that Wisconsin itself deems misdemeanants automatically capable of participating in civic life and possessing firearms.[23] As the dissent in *Caron* recognized "it is bizarre to hold that the *legal* possession of firearms under state law subjects a person to a sentence enhancement under federal law." 524 U.S. at 318 (Thomas, J., dissenting) (emphasis in original).

Florida misdemeanants would suffer a similarly bizarre disadvantage under the Seventh Circuit's interpretation. Felons in Florida lose civil rights and firearms rights but misdemeanants do not, even if convicted of a misdemeanor punishable by more than two years.[24] See Fla. Const. Art. 6, § 4(a) (rights to vote and hold office lost by felony conviction); Fla. Stat. § 40.013(1) (right to serve on jury lost by felony conviction). Most felons regain their civil rights

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because "persons on probation for misdemeanors do not lose any civil rights, which obviates the need for a discharge document to be filed on their behalf").

[23] The Seventh Circuit suggested that Petitioner's battery convictions would be considered felonies in most states. JA 32-33. What the crime would be in other states is irrelevant. In fact, Wis. Stat. § 940.19(1), for which Petitioner was convicted, is the least serious form of battery in Wisconsin, and is clearly a misdemeanor. In Wisconsin, felony battery requires substantial bodily harm or great bodily harm under Wis. Stat. § 940.19(2) and (4) respectively. Petitioner was not initially charged with, or convicted of either of those felony level offenses.

[24] Until July 1, 1999, misdemeanors committed while evincing prejudice were punishable by up to five years imprisonment. *See* Fla. Stat. § 775.082 (1998) (third degree felonies punishable by maximum term of five years imprisonment); *id.* § 775.085(1)(b) (1998) (first degree misdemeanors committed with evident prejudice punishable as if classified as third degree felony). Since July 1, 1999, offenses committed while evincing prejudice are reclassified to the next-higher class of offense. *See id.* § 775.085(1)(a).

automatically upon completion of sentence or after a waiting period, and can regain firearms rights by application eight years after completion of sentence, thus satisfying § 921(a)(20)'s exemption. See Rules of Executive Clemency at 5(I)(D), 9-10.[25] In contrast, misdemeanants who never lose civil rights or firearms rights would need to obtain an expungement or "set aside" (neither of which is available in Florida) or a pardon (which is rarely granted) in order to satisfy the exemption clause.

This result directly contradicts Florida law governing firearm rights. Florida prohibits a person convicted of a felony from possessing a firearm if civil rights have not been restored. See Fla. Stat. § 790.23(1), (2).[26] In *Doyle* v. *Florida Department of State,* 748 So. 2d 353 (Fla. 1st Dist. 1999), the Florida District Court of Appeal held that § 790.23 did not prohibit a person convicted of a misdemeanor in another jurisdiction from possessing a firearm in Florida even if the crime of conviction would have been a felony in Florida because "if section 790.23 does not apply to a person whose civil rights have been *restored*, it certainly cannot apply to a person whose civil rights were never suspended, as in the case of one convicted only of a misdemeanor." See *id.* at 355-56 (emphasis in original). In Florida, therefore, the Seventh Circuit's interpretation not only creates absurd results, but its reasoning has been rejected by Florida courts. This contradicts Florida's rules governing restoration, which this Court has stated should be squarely within Florida's province. See *Caron*, 524 U.S. at 316 (stating "[r]estoration of the right to vote, the right to hold office, and the right to sit on a jury

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[25] *Available at* https://fpc.state.fl.us/Clemency.htm

[26] Certain misdemeanants are prohibited from obtaining a license to carry a concealed weapon for three years following either the date of conviction or the completion of any release conditions. *See* Fla. Stat. § 790.06(2)(e)-(f). None of those misdemeanors is punishable by more than two years, however, and would thus be exempt from the federal definition of a "conviction" under § 921(a)(20)(B).

turns on so many complexities and nuances that state law is the most convenient source for definition").

In at least eleven other jurisdictions, despite the States' clear indications that certain persons are trustworthy enough to be exempted from federal law, persons convicted of less serious crimes are treated as harshly or worse than those persons with more serious convictions. See FAMM/NACDL *Amici* Br. 11-25. In essence, the Seventh Circuit's interpretation would revive *Dickerson* in that federal law, not state law, would control what is meant by "trustworthiness," or "law abiding" in the context of the civil rights restored exemption and § 921(a)(20).

C. Excluding Convictions For Which Civil Rights Were Retained Upsets Societal Norms And Is An Irrational Distinction.

The underlying principle and common sense application of the statute is to determine whether the convicting jurisdiction has deemed an individual trustworthy following a particular conviction. The Seventh Circuit ignored this common sense application. When construing a statute, courts "must be guided to a degree by common sense." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Courts also try to avoid interpretations of statutes that would upset long-standing and widely held mores and social norms, absent an explicit congressional intention to do so. Cf. *Staples* v. *United States*, 511 U.S. 600, 610 (1994) (narrowly interpreting 26 U.S.C. § 5861(d) to require knowledge, in light of "the long tradition of widespread lawful gun ownership" in America).

It is a universal American legal norm that less serious offenders should be treated accordingly. All other things being equal, we do not punish more harshly those who are less culpable, and less harshly those who are more culpable. For example, in North Dakota, felons who are sentenced to probation retain all three civil rights. Felons who are

sentenced to a term of incarceration, however, lose all three civil rights and have them automatically restored upon completion of the sentence.[27] North Dakota plainly has made a determination that the former is a less serious offense and offender than the latter. As this Court has noted: "A sentence of probation, however, even if 'lenient,' ordinarily reflects the judgment that the offense and offender's criminal history were not so serious as to warrant imprisonment." *Granderson*, 511 U.S. at 51. Under the Seventh Circuit's interpretation, however, felons sentenced to incarceration would satisfy the exemption clause, while less serious felons sentenced to probation would not.

In *Caron*, this Court specifically addressed the opposite concern – that the most egregious cases should not avoid the federal firearms ban, or the most serious penalties. The Court noted that by prohibiting *Caron* from possessing one type of firearm, "[t]he State has singled out the offender as more dangerous than law-abiding citizens." *Caron*, 524 U.S. at 315. It considered that if it viewed a state's partial ban on firearms as sufficient to satisfy the unless clause in Caron's case, then it "would make these partial restrictions a nullity under federal law, indeed in the egregious cases with the most dangerous weapons." *Id.* It concluded that "Congress cannot have intended this bizarre result." *Id.* Here, the Seventh Circuit's interpretation of the exemption clause results in the exclusion of *less* egregious cases (i.e., those which a state determined not serious enough to take away civil rights at all) from the exemption clause.

Likewise, in *Small*, the Court avoided an interpretation of § 922(g)(1) which would result in a similar senseless

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[27] *See* N.D. Cent. Code § 12.1-33-01(1)(a) (right to vote); *id.* § 12.1-33-01(1)(b) (right to hold public office); *id.* § 27-09.1-08(e) (right to serve on a jury); *id.* § 12.1-33-03(1) (all rights restored upon release from prison). All felons lose firearm rights, which are automatically restored after a waiting period.

distinction when it found that "Congress did not consider" the phrase "convicted in any court" to include foreign convictions as predicate offenses for § 922(g)(1). 544 U.S. at 392. The Court was troubled by the "apparently senseless distinction" in the statute between, for example, three predicate convictions for a "serious drug offense" committed within the United States (which would result in increased penalties) and the same convictions for serious drug offenses committed in a foreign country (which would not result in increased penalties because the penalty provision only specifies state or federal offenses). *Id.* So too should this Court be concerned with a senseless distinction that subjects less serious offenders to enhanced sentences and firearms prohibitions while it exempts more serious offenders.

Those circuit courts in the majority on the question presented here have commented on the irrationality of the distinction later adopted by the Seventh Circuit in this case. See, *e.g.*, *Cassidy*, 899 F.2d at 549 n.13 ("[t]here is no rational basis . . . for distinguishing between civil rights possessed by a felon after his release that were not expressly taken away, and those civil rights which were negated . . . and then reinstated after his release"); *Thomas*, 991 F.2d at 212 ("[W]e [are] unable to embrace an interpretation that results in convicting a person under § 922(g) who has never lost his civil rights, and who is not prohibited by the state from possessing a gun, while simultaneously immunizing from such a conviction one who was stripped of his civil rights . . . but has subsequently had them affirmatively 'restored' [such a result is a] wonderland").

Moreover, a person deemed more trustworthy by a state because he was allowed to retain his civil rights despite a conviction is *better* situated than a person whose civil rights were taken away. The Seventh Circuit's interpretation of "civil rights restored" treats the less serious offender more harshly by requiring a restoration.

The only possible legitimate government interest in drawing such a distinction is best summarized by the Second Circuit in *McGrath*:

> By the *affirmative act* of pardon, expungement or restoration, the state has declared its renewed trust in that person. This rationale does not apply with equal force, however, where the legislature of the state has simply failed to provide that those found guilty of misdemeanors will lose any civil rights as a collateral consequence of their convictions. *There is no individualized official judgment*, as in a pardon or expungement, that the particular person in question has demonstrated some reason to be singled out from Congress's overall judgment that persons convicted of serious crimes not be allowed to carry weapons.

McGrath, 60 F.3d at 1007-08 (quoting *United States* v. *Ramos*, 961 F.2d 1003, 1009 (1st Cir. 1992)) (emphasis in original). But even the Second Circuit, in its very next sentence, acknowledged that a majority of circuits disagreed with such a justification. *McGrath*, 60 F.3d at 1008. As this Court concluded in *Caron*, restoration by operation of law is sufficient to trigger the exemption clause, 524 U.S. at 313-14, and it is the more frequent means of restoring civil rights. See NACDL/FAMM *Amici* Br. app 2. Accordingly, the Second Circuit's assumption that restoration is somehow different because it involves in all cases an individualized determination of trustworthiness is demonstrably incorrect and the argument fails for that reason alone.

Nor should the Second Circuit's argument succeed even if the assumption were correct for the simple reason that an individualized determination of trustworthiness is no more of an "affirmative act" than a broad legislative determination that persons who commit certain crimes nonetheless deserve to retain their civil rights. Indeed, such a non-individualized determination is an even bolder affirmative statement of inherent trustworthiness than an individualized requirement.

The Second Circuit's reasoning in *McGrath* gives absolutely no effect to a state legislature's affirmative statement in this regard and the Court should reject its holding for this reason as well.

V. LENITY REQUIRES "CIVIL RIGHTS RESTORED" TO INCLUDE CIVIL RIGHTS RETAINED.

When the "text, structure, and history fail to establish that the Government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *Granderson*, 511 U.S. at 54. The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981). "[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota* v. *United States*, 471 U.S. 419, 427 (1985). It also ensures that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Albernaz*, 450 U.S. at 342. It reflects "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *United States* v. *Bass*, 404 U.S. 336, 348 (1971).

At the very least, including rights retained in the exemption clause is a plausible interpretation. The Seventh Circuit's interpretation, however, offends both purposes of the rule of lenity. First, the clause's uncertainty as to whether convictions for which civil rights were retained are included within the exemption clause fails to provide fair warning to individuals who may be prosecuted under § 922(g)(1). A misdemeanant or less serious felon would see that the statute allows a comparatively more serious felon to be exempt from prosecution under certain circumstances that are not unlike his. It is reasonable for that less serious offender to presume

that he, too, would be exempt. Second, excluding convictions for which civil rights were retained from the exemption clause can result in increased penalties under § 924(e)(1).

Reading the exemption clause broadly to include civil rights retained solves both of these inequities. First, Congress did not contemplate a broad reading which results in an expansive prosecutorial reach of § 922(g)(1). Second, it reduces the number of convictions that would qualify for increased penalties under § 924(e)(1) to include only the worst of offenders. As to Petitioner in particular, the district court found that he was an armed career criminal and sentenced him to 180 months imprisonment. The Seventh Circuit affirmed the finding that Petitioner's three misdemeanor convictions qualified as violent felonies for purposes of § 924(e)(1). If the Court accepts Petitioner's interpretation of the exemption clause, then his statutory maximum penalty is 120 months imprisonment, and his guideline range is 37-46 months. A broad reading of the exemption clause, therefore, is the less harsh alternative, and provides fair warning of prosecutorial reach. It also ensures that individuals will not languish in prison for mandatory minimum periods of 15 years when Congress did not clearly say or intend they should.

CONCLUSION

For the reasons stated, the Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit, and remand this case for further proceedings consistent with the Court's opinion.

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In the Supreme Court of the United States

JAMES D. LOGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

A prior conviction does not count as a sentencing predicate under the Armed Career Criminal Act of 1986, 18 U.S.C. 924(e)(1), if the defendant's civil rights were "restored." 18 U.S.C. 921(a)(20). The question is whether a State restores civil rights for purposes of that provision when it never deprives a defendant of those rights, and instead leaves the rights intact at all times.

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In the Supreme Court of the United States

No. 06-6911

JAMES D. LOGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 28-36) is reported at 453 F.3d 804.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2006. The petition for a writ of certiorari was filed on September 29, 2006, and was granted on February 20, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Federal law generally prohibits a person who has been "convicted in any court of * * * a crime punishable by imprisonment for a term exceeding one year" from possessing firearms. 18 U.S.C. 922(g)(1). Under the Armed Career Criminal Act of 1986 (ACCA), a per-

son convicted of that offense is subject to a mandatory minimum 15-year sentence if he has at least three prior convictions for violent felonies or serious drug offenses. 18 U.S.C. 924(e)(1) (Supp. IV 2004). The term "violent felony" generally refers to a violent crime that is "punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B). But with respect to an offense classified by a State as a misdemeanor, Congress specified that such an offense may qualify as a "violent felony" (or a predicate for a felon-in-possession conviction) if it is punishable by more than two years of imprisonment. 18 U.S.C. 921(a)(20)(B).

In 1986, Congress amended Section 921(a)(20) to include, among other things, the following exemption:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction * * * unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Firearms Owners Protection Act (FOPA), Pub. L. No. 99-308, § 101(5), 100 Stat. 449.

2. On May 31, 2005, police officers responded to a domestic disturbance complaint by Asenath Wilson. Wilson told police that petitioner, her boyfriend, had punched her in the face. She also said that petitioner was outside her residence and that his car, which was parked in her garage, contained drugs and perhaps a handgun. After obtaining petitioner's consent to search the car, a police officer found a loaded pistol inside the glove compartment. The officer also found a switchblade knife and a device used for smoking crack cocaine. See J.A. 9; Gov't C.A. Br. 5.

3. Petitioner pleaded guilty to possessing a firearm after having been convicted of a felony (namely, unlawful possession of a controlled substance), in violation of 18 U.S.C. 922(g)(1). J.A. 9-12, 14-15. The district court sentenced petitioner under ACCA to 15 years of imprisonment because, in addition to the drug offense, petitioner had three prior state misdemeanor battery convictions that were punishable by a maximum of three years of imprisonment. See J.A. 16-17.

In sentencing petitioner, the court stated that 15 years of imprisonment was "necessary to satisfy the statutory purposes of sentencing under [18 U.S.C. 3553] which in this case is to physically incapacitate the defendant in order to protect the community from his undeterred and dangerous criminal conduct." J.A. 18. The court explained that petitioner's "criminal history dates back to his adolescent years," that petitioner was convicted of committing many crimes, and that petitioner "had a number of cases, many with active warrants, that were pending when he committed this offense." *Ibid.*

4. On appeal, petitioner argued that the Wisconsin misdemeanor convictions should be disregarded under Section 921(a)(20) because they did not result in the loss of his civil rights. The court of appeals rejected that contention and affirmed. J.A. 28-36.

The court of appeals held that Section 921(a)(20)'s exclusion of "any offense * * * for which a person * * * has had civil rights restored" applies only when a State deprives a defendant of civil rights and later restores them. J.A. 28-29 (internal quotation marks omitted). Because "[t]he word 'restore' means to give back something that had been taken away," the court explained that "the 'restoration' of a thing never lost or diminished is a definitional impossibility." *Ibid.* (quoting

McGrath v. *United States*, 60 F.3d 1005, 1007 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)).

The court of appeals explained that the absence of legislative history directly on point does not justify a departure from the statute's plain language because "[s]tatutes do not depend, for their force, on some statement in the legislative history along the lines of: 'We really mean it!'" J.A. 29. The court criticized petitioner's position as resting on "imaginative reconstruction —the idea that a court may implement what it is sure the legislature would have done (had it faced the question explicitly) rather than what the legislature actually did." J.A. 33. When Congress's expressed intent is plain, the court explained, courts are not free to act as "effective lawmakers." *Ibid.*

The court of appeals also noted that for purposes of 18 U.S.C. 922(g)(9), which proscribes the possession of firearms by persons convicted of a misdemeanor crime of domestic violence, "[a] person shall not be considered to have been convicted of such an offense" if he "has had civil rights restored (*if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense*)." 18 U.S.C. 921(a)(33)(B)(ii) (emphasis added); see J.A. 34. Thus, the court reasoned that when Congress specifically addressed the issue presented here in a related statute, it recognized that rights can be restored only if they had been lost. *Ibid.* As a result, the court explained, petitioner's "guess about what Congress 'would have done, had it thought' turns out to be wrong." *Ibid.*

Nor was the court persuaded that the statute's plain language produced an absurd result. J.A. 30. The court agreed with petitioner that "someone whose civil rights have not been revoked cannot have them restored," but

explained that "restoration of civil rights is just one of three ways to erase a conviction from one's record for purposes of federal law." J.A. 31. "The other two—expungement and pardon—are as available to people who never lost their rights to vote, hold office, and serve on juries, as they are to other offenders." *Ibid.*

The court of appeals recognized that Congress's decision to defer to state pardons, expungements, set asides, and restorations of rights "ensured that similarly situated people would be treated differently—for states vary widely in which if any civil rights a convict loses and whether these rights are restored." J.A. 32. Thus, the court concluded that disparate treatment is "inherent in the legislative choice to make federal sentences depend on" state law. J.A. 35-36. "What a federal court *can* do, as a uniform matter, is count all state convictions unless the state extends a measure of forgiveness" by "pardon, expungement, or a restoration of civil rights." J.A. 36.

SUMMARY OF ARGUMENT

A. Petitioner is subject to a 15-year mandatory minimum sentence under ACCA unless his civil rights were "restored." 18 U.S.C. 921(a)(20). Because petitioner never lost his civil rights, those rights were not (and could not have been) restored. The plain meaning of "restore" is to "give back," not to "leave alone."

B. The statute's structure confirms its plain meaning. Offenses that might otherwise qualify as felon-in-possession or ACCA predicates, but are nonetheless exempted by the very nature of the offense, are addressed in Section 921(a)(20)(A) and (B). The final sentence of Section 921(a)(20), which was added by FOPA, addresses subsequent actions that exempt a defendant

convicted of an offense that, absent the subsequent action, would qualify as a predicate offense. Petitioner's argument is, at bottom, that because his civil rights were not removed by virtue of his misdemeanor convictions, those convictions should not have qualified as predicate offenses. But Section 921(a)(20)(B) expressly addresses the circumstances in which state misdemeanors qualify as predicate offenses, and petitioner concedes that his offenses are not exempted by Section 921(a)(20)(B). The final sentence, under which petitioner seeks relief, structurally is addressed to subsequent acts, not exempting offenses in the first instance.

Section 921(a)(20) refers to a pardon, expungement, set aside, or restoration of rights. All of those actions change a defendant's legal status by extending a measure of forgiveness and relieving him of some or all of the consequences of his conviction. In contrast, a defendant who merely retains rights at all times does not receive a measure of forgiveness, and indeed does not receive any relief from the consequences of his conviction.

Section 921(a)(20) goes on to provide that the restoration-of-rights exemption does not apply if the "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." The statute thereby contemplates a specific, formal change in the defendant's legal status that could be accompanied by an express proviso against gun possession—not a mere retention of rights at all times.

The restoration-of-rights provision does not, as petitioner contends, defer to a State's determination that an individual is sufficiently trustworthy to possess firearms. As this Court explained in *Caron* v. *United States*, 524 U.S. 308, 315 (1998), the very point of ACCA is to "keep guns away from all offenders who, the Fed-

eral Government feared, might cause harm *even if those persons were not deemed dangerous by States*" (emphasis added). Thus, while the statute defers to a State's express determination to change a defendant's legal status by pardon, expungement, set aside, or restoration of rights, it does not uniformly defer to a State's decision to allow a defendant to possess some firearms.

Nor is there merit to petitioner's contention that because Congress more expressly addressed the precise scenario of a defendant whose civil rights were never lost in another provision (18 U.S.C. 921(a)(33)(B)(ii)), and made clear that such defendants do *not* qualify for the exemption, that subsequent Congress must have intended Section 921(a)(20)'s exemption to extend to such defendants. For purposes of the related firearms prohibition for domestic violence misdemeanants, Section 921(a)(33)(B)(ii) carves out an exemption for a defendant who "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under [the predicate] offense)." 18 U.S.C. 921(a)(33)(B)(ii). Congress enacted Section 921(a)(33) ten years after Section 921(a)(20)'s enactment and after some courts of appeals had questioned, in *dicta*, whether Congress had intended to exclude from Section 921(a)(20)'s exemption persons who had never lost their civil rights. Thus, the parenthetical's obvious import is to *clarify* the meaning of "restored" in the new statute, not to *change* the meaning of that term in the earlier statute. Moreover, Congress's decision to clarify that defendants, like petitioner, who never lost their civil rights do *not* qualify for an analogous exemption is fatal to petitioner's argument that such a result is absurd.

C. Petitioner resorts to the *absence* of legislative history directly on point in order to support his claim

that Congress could not have intended what it expressly said. But a law cannot be judicially amended because Congress did not confirm its plain meaning in legislative history.

D. While petitioner argues that it was absurd for Congress not to broaden the exemption to include retention of rights, even petitioner must concede that Congress did just that in Section 921(a)(33)(B)(ii). Petitioner is not at liberty to dismiss such an explicit congressional policy choice as absurd. Moreover, there is nothing irrational about Congress's decision first to determine the seriousness of a crime based on primarily federal criteria, and then to defer to a State's decision to change a defendant's legal status by relieving him of some or all of the consequences of a conviction. Doing so balances Congress's desire to enact tougher federal laws with its deference to States' determinations to set aside or otherwise forgive convictions. Defendants who are not eligible for restoration of rights may still apply for pardons.

Moreover, the primary anomaly identified by petitioner—that in some States, misdemeanants are not eligible for restoration while felons' civil rights and firearms rights are automatically restored—appears to arise only in three States. Even those States impose significant waiting periods or other restrictions that make restoration less than automatic. In contrast, petitioner's position creates its own anomaly—persons convicted of serious felonies in States that do not revoke civil rights would automatically be treated as having had their civil rights restored, while persons convicted of less serious crimes in other States would not. It would make little sense to overturn the clear statutory text and structure in order to choose one anomaly over another.

Congress understood that, in imposing federal consequences on state convictions, some complications would arise. Certainly the presence of an anomaly in three States would not justify ignoring the text that Congress chose.

ARGUMENT

THE RESTORATION-OF-RIGHTS EXEMPTION APPLIES ONLY WHEN THE CONVICTING JURISDICTION DEPRIVED A DEFENDANT OF CIVIL RIGHTS AND LATER GAVE THOSE RIGHTS BACK

Petitioner pleaded guilty to being a felon in possession of a firearm, in violation of Section 922(g)(1), and is therefore subject to a mandatory minimum 15-year sentence if he was previously convicted of three violent felonies or serious drug offenses. 18 U.S.C. 924(e)(1). There is no dispute that petitioner was previously convicted in Wisconsin of three battery offenses that facially qualify as violent felonies under Section 921(a)(20)(B) because, while Wisconsin classified those offenses as misdemeanors, the maximum punishment for each of them was more than two years of imprisonment. See J.A. 28; Pet. Br. 4.

Accordingly, the only question in this case is whether petitioner qualifies for the following exemption set forth in the final sentence of Section 921(a)(20):

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. 921(a)(20). While Section 921(a)(20) does not define the term "civil rights," the courts have held, and petitioner agrees, that the relevant civil rights are the rights to vote, hold public office, and serve on a jury. See, *e.g.*, Pet. Br. 13 n.10 (citing cases); cf. *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (identifying, in *dictum*, the three civil rights).

Petitioner never received a pardon, set aside, or expungement. J.A. 36. And while petitioner relies on the restoration-of-rights provision, he concedes (Pet. Br. 5) that Wisconsin never deprived him of any of the rights in question. That is the beginning and end of this case because, as the court of appeals held, rights that were never lost cannot have been "restored." J.A. 29.

A. The Plain Meaning Of "Restore" Is To Give Back, Not To Leave Alone

1. The restoration-of-rights exception is unambiguously limited to restoration, not retention, of rights. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

That canon is dispositive because "restored" does not mean "retained." Rather, it means "[t]o give back (something which has been lost, or taken away); to make restitution of; to return." *Webster's New Int'l Dictionary of the English Language* 2125 (2d ed. 1958); see *Webster's Third New Int'l Dictionary of the English Language* 1936 (1993) ("[T]o give back (as something lost or taken away)."); *American Heritage Dictionary*

of the English Language 1538 (3d ed. 1992) ("To bring back into existence or use; reestablish."); *Oxford English Dictionary* 755-756 (2d ed. 1989) ("To give back, to make return or restitution of (anything previously taken away or lost)."); *Random House Dictionary of the English Language* 1222 (1966) ("[T]o bring back into existence, use, or the like; reestablish.").

Because the State did not take away petitioner's civil rights as a result of his misdemeanor battery convictions, it could not have "restored" those rights. J.A. 29. Instead, the State simply left the rights alone. As the court of appeals explained, "[t]he 'restoration' of a thing never lost or diminished is a definitional impossibility." *Ibid.* (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1007 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)); accord *United States* v. *Brailey*, 408 F.3d 609, 612 (9th Cir. 2005); *United States* v. *Jennings*, 323 F.3d 263, 267 (4th Cir.), cert. denied, 540 U.S. 1005 (2003); see *United States* v. *Caron*, 77 F.3d 1, 3 (1st Cir. 1996) (en banc) (defining "restore" as "bring back to an original state or condition").

2. Neither petitioner nor his amici appear to dispute that dispositive textual point. See Pet. 7 ("The ordinary reading of the 'restored' provision would not seem to apply to [petitioner] because his civil rights were never taken away in the first place."); Pet. C.A. Br. 9-10 (same). Indeed, they offer no alternative definition of the term "restored," and petitioner's own usage of that term reflects the difference between restoration and retention of rights. Expressly juxtaposing rights "restored" or "regained" with rights "retained" or "attained" (Pet. Br. 15, 24), petitioner argues that "retention and restoration are indistinguishable" on policy grounds, and he criticizes the court of appeals' conclu-

sion that "restoration is somehow different" from retention. Pet. Br. 15, 33; see *id.* at 22. Petitioner thereby makes clear that his argument is a policy one at odds with the clear statutory text.

The only court of appeals that held in petitioner's favor on the question presented here likewise acknowledged that "[c]learly the ordinary reading of the word 'restored' supports the government," but concluded that the defendant's civil rights "should be *treated as* 'restored.'" *United States* v. *Indelicato*, 97 F.3d 627, 629, 631 (1st Cir. 1996) (emphasis added), cert. denied, 519 U.S. 1140 (1997). One of petitioner's amici likewise argues that a person who retained civil rights "should be *considered* as having civil rights restored." National Rifle Ass'n (NRA) Br. 2-3 (emphasis added). Of course, their need to treat a statutory requirement *as if* it were satisfied only serves to underscore that it is not in fact satisfied.

3. Contrary to petitioner's contention (Pet. Br. 14-16), the government and this Court did not adopt an atextual interpretation of the term "restored" in *Caron*, *supra*. In that case, Massachusetts had taken away and later automatically restored the defendant's rights to serve on a jury and to hold public office, and the defendant had retained his right to vote at all times. *Caron*, 77 F.3d at 1-2. The court of appeals held that the defendant "'had civil rights restored' within the meaning of" Section 921(a)(20), *id.* at 2, and the government agreed with that conclusion when the case reached this Court on a different issue, 524 U.S. at 313. But the conclusion that a defendant's civil rights are restored when two of those rights are taken away and later returned hardly suggests that mere retention of all three rights consti-

tutes restoration. Unlike the defendant in *Caron*, petitioner did not lose and recover *any* civil rights.

Petitioner also contends (Pet. Br. 24) that "if the process by which civil rights are *restored* is irrelevant" under *Caron* because they can be restored either on a case-by-case-basis or by operation of law, "then so too is the process by which civil rights are *attained*" (emphases added). That conclusion does not follow. It does not matter *how* rights were restored because what matters is *whether* they were restored. But it certainly matters whether rights were restored because that is the statutory test.[1]

B. The Statute's Structure Confirms Its Plain Meaning

If further evidence were needed of the plain meaning of the term "restored," the statutory context provides it.

1. Sections 921(a)(20)(A) and (B) address offenses that, Congress determined, should be exempted because of their very nature. Section 921(a)(20)(A) excludes

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[1] There is no merit to amicus NRA's argument (NRA Br. 29-30) that the government has inconsistently advocated a different understanding of the word "restored" as used in a different statute. Section 5845(c) of Title 26 defines a "rifle" to include a weapon "made" to be fired in a certain way, as well as a weapon that may be "readily restored" to fire in that way. In lower courts, the government initially argued in part that unassembled rifle parts qualified as a "rifle" under the "readily restored" prong of the statute even though the parts had not been previously assembled. But when the issue came before this Court, the government abandoned that position and relied instead on the "made" prong of the statute. U.S. Br. at 10, *Thompson/Center Arms Co. v. United States*, 504 U.S. 505 (1992) (No. 91-164). Indeed, the government described a "readily restor[able]" rifle as one requiring "*re*-assembly," *id.* at 18 (emphasis added)—*i.e.*, "[a] weapon that once was a rifle, but which now lacks some essential component," *id.* at 17-18. That plain-language interpretation of the term "restored" is fully consistent with the government's plain-language interpretation in this case.

some offenses that "relat[e] to the regulation of business practices," while Section 921(a)(20)(B) excludes misdemeanors that are not punishable by more than two years of imprisonment. In contrast, the final sentence of Section 921(a)(20), on which petitioner relies, addresses subsequent actions that exempt a defendant convicted of an offense that, absent the subsequent action, would qualify as a predicate offense. By arguing (Pet. 24, 31) that offenses for which defendants are not deprived of civil rights are not sufficiently serious to count as ACCA predicates, petitioner is invoking the considerations that underlie Section 921(a)(20)(B), *not* those that underlie Section 921(a)(20)'s last sentence. Section 921(a)(20)(B) expressly addresses the circumstances in which state misdemeanors qualify as predicate offenses, and petitioner's offenses qualify under that provision because they were punishable by more than two years of imprisonment. See J.A. 28; Pet. Br. 4.

Words in a list are generally known by the company they keep. *E.g.*, *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 36 (1990); *Beecham* v. *United States*, 511 U.S. 368, 371 (1994). Section 921(a)(20) refers to a pardon, an expungement or set aside of a conviction, or a restoration of civil rights. Pardon, expungement, and set aside all entail a change in a defendant's legal status by which the government extends a measure of forgiveness and relieves a convict of some or all of the consequences of his conviction. See Pet. App. 8-9; *McGrath*, 60 F.3d at 1007, 1008; see also *Schick* v. *Reed*, 419 U.S. 256, 266 (1974) ("The plain purpose of the [pardon] power * * * was to allow * * * the President to 'forgive' the convicted person."); *United States* v. *Potts*, 528 F.2d 883, 885 n.4 (9th Cir. 1975) ("[L]ike a pardon, [expunction] * * * forgives a crime."); *Doe* v. *Webster*, 606 F.2d

1226, 1233 n.20 (D.C. Cir. 1979) (a set-aside certificate is "a symbolic token of forgiveness").

A restoration of civil rights has that consequence because the State, through subsequent action, extends a measure of forgiveness by returning rights to a defendant that he had previously lost because of his conviction. In contrast, a defendant who merely retains his civil rights at all times does not receive a measure of forgiveness, and indeed does not receive any relief from the consequences of his conviction.

Moreover, Section 921(a)(20) goes on to provide that its exemption does not apply if the "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." The statute thereby contemplates a specific, formal change in a defendant's legal status that could be accompanied by an express proviso against gun possession. In contrast, mere retention of rights does not entail any undertaking by the State that could include such an express proviso. *United States* v. *Ramos*, 961 F.2d 1003, 1006-1008 (1st Cir.), cert. denied, 506 U.S. 934 (1992), overruled by *Indelicato*, 97 F.3d at 628-629.

As already noted, in addition to containing the restoration-of-rights exemption, Section 921(a)(20) specifies in subsection (B) that misdemeanors punishable by more than two years of imprisonment are qualifying offenses. As a matter of the statute's structure, subsection (B)—not the restoration-of-rights provision—addresses the circumstances in which misdemeanor offenses do not qualify as predicate offenses. See pp. 13-14, *supra*. As a general matter, it is unusual for a State to deprive a misdemeanant of civil rights. See, *e.g.*, NACDL Lodging App. 1; *United States* v. *Barnes*, 295 F.3d 1354, 1368 (D.C. Cir. 2002). Thus, if retention of

civil rights qualified as restoration of those rights, Section 921(a)(20)'s restoration-of-rights exemption would come close to vitiating subsection (B)'s inclusion of misdemeanors punishable by more than two years of imprisonment. That unlikely result provides further contextual evidence that when Congress said "restoration," it did not mean "retention." See *Barnes*, 295 F.3d at 1368 (holding that the term "restoration" as used in similar provision of 18 U.S.C. 921(a)(33) does not include retention of rights for this reason); *United States* v. *Smith*, 171 F.3d 617, 623-624 (8th Cir. 1999) (same).

2. Petitioner argues (Pet. Br. 8, 16) that the restoration-of-rights provision is satisfied, not by an affirmative act of forgiveness that changes a defendant's legal status, but by a State's determination that an individual is sufficiently trustworthy to possess firearms. In his view, the statute "give[s] full effect to a state's determination whether a particular conviction is of the sort that should restrict an individual's right to possess a firearm." *Id.* at 8. That contention misperceives not only the plain meaning of "restored" and the statutory structure discussed above, but also the role of state law in the statutory scheme. As this Court has explained, Congress determined that state laws "provide[d] less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness." *Caron*, 524 U.S. at 315 (quoting *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 120 (1983)). Thus, Congress sought to "keep guns away from all offenders who, the Federal Government feared, might cause harm *even if those persons were not deemed dangerous by States.*" *Ibid.* (emphasis added); see 18 U.S.C. 922(q)(1)(A) and (H) (finding that crime involving guns is a "pervasive, nationwide problem," in part because "even States, localities, and

school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures").

Contrary to petitioner's implication, state law does not play a controlling role in all aspects of the federal prohibition against firearms possession by convicts and the related sentence enhancement. Under ACCA, a defendant must have previously been convicted of three crimes that qualify as "violent felon[ies]" or "serious drug offense[s]" within *Congress's* definitions of those terms. 18 U.S.C. 924(e)(1) and (2) (Supp. IV 2004). State law determines what constitutes a "conviction" (as opposed to, for example, a deferred adjudication).[2] And the penalties imposed by a State are also relevant to whether the offense qualifies as a "violent felony" or "serious drug offense." 18 U.S.C. 921(a)(20), 924(e)(2). But those inquiries are far more specific than whether a State would consider a defendant sufficiently trustworthy to possess firearms.[3]

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[2] The Senate Report explains that the statute requires the existence of a "conviction" to be determined in accordance with state law in order "to accommodate state reforms * * * which permit dismissal of charges after a plea and successful completion of a probationary period, or which create 'open-ended' offenses, conviction for which may be treated as misdemeanor or felony at the option of the court." S. Rep. No. 583, 98th Cong., 2d Sess. 7 (1984); see *id.* at 7 n.16.

[3] In particular, Congress did not treat the State's label of an offense as a *misdemeanor* as sufficient to preclude the federal system from treating it as a violent *felony*. Instead, Congress gave some weight to that state label by requiring a sentence of more than two years—rather than the normal one year—for such misdemeanors. 18 U.S.C. 921(a)(20)(B). As noted, because misdemeanors generally do not involve the loss of civil rights, petitioner's argument ultimately cannot

If a defendant has been convicted of a violent felony or serious drug offense, Section 921(a)(20) respects a State's decision to pardon the defendant, set aside or expunge his conviction, or restore his civil rights, so long as the State does not concurrently restrict his firearms rights. But, as the court of appeals explained, those are the *only* ways a State can relieve a defendant of the consequences of a conviction for purposes of ACCA. J.A. 36. If the States' general trustworthiness determinations controlled who could possess firearms under federal law, the federal prohibition would be at most "a sentence enhancement" for the violation of state-law prohibitions against possession of firearms—"a result inconsistent with * * * congressional intent," as this Court recognized in *Caron*. 524 U.S. at 316.

Petitioner only underscores the lack of a textual basis for his argument by contending (Pet. Br. 30) that, if this Court reads Section 921(a)(20) according to its plain language, then "federal law, not state law, would control what is meant by 'trustworthiness,' or 'law abiding' in the context of the civil rights restored exemption and § 921(a)(20)." Neither "trustworthiness" nor "law abiding" appears in Section 921(a)(20). Instead, the statute uses the term "restored."

Petitioner's reliance (Pet. Br. 14 n.11, 22-23) on 18 U.S.C. 925(c) confirms his substitution of a general "trustworthiness" rationale for the statutory text in Section 921(a)(20). Section 925(c)—which Congress expanded at the same time it enacted the restoration-of-rights provision, see FOPA § 105, 100 Stat. 459—authorizes the Attorney General to grant relief from the federal fire-

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be squared with the congressional judgment reflected in subsection (B). See pp. 15-16, *supra*.

arm disability "if it is established to [the Attorney General's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." Petitioner correctly argues (Pet. Br. 23) that "*this provision* [Section 925(c)] squarely addresses a person's trustworthiness with respect to possessing a firearm" (emphasis added). But the trustworthiness assessment under Section 925(c) is a federal one. Far from supporting petitioner's position that a *state* determination of trustworthiness suffices, Section 925(c) only underscores that the determination is a *federal* one, aided only in specific, limited ways by the laws and actions of the States.

3. Petitioner erroneously argues (Pet. Br. 20-22) that Congress's explicit statement in another provision that civil rights can be restored only if they were once lost requires the conclusion that the term "restored" must mean something else in Section 921(a)(20).

In defining a "conviction" for purposes of Section 922(g)(9)'s bar on the possession of firearms by a person who had been convicted of a misdemeanor crime of domestic violence, Section 921(a)(33)(B)(ii) states that a person shall not be considered to have been convicted of such a crime if he "has had civil rights restored (*if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense*)" (emphasis added). That parenthetical does not diminish the clarity of Section 921(a)(20)'s language and statutory structure because Congress's explicit reference in Section 921(a)(33) to the loss of civil rights does not alter the meaning of "restored" standing alone. See *Limtiaco* v. *Camacho*,

127 S. Ct. 1413, 1419 (2007) ("explicit references" in one statute do not require other statute to be interpreted differently).

Petitioner (Pet. Br. 21) invokes the canon that "where Congress includes particular language [here, the parenthetical] in one section of a statute but omits it in another section of the same Act, it * * * acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). But that canon applies only where the two sections are parts of "the same Act." *Ibid.*; see *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002); *Bates* v. *United States*, 522 U.S. 23, 29 (1997). Congress enacted Section 921(a)(33) ten years after a different Congress had enacted Section 921(a)(20), and after some courts of appeals had questioned, in *dicta*, whether Congress had intended to exclude persons who had never lost their civil rights from Section 921(a)(20)'s exemption. See *United States* v. *Hall*, 20 F.3d 1066, 1069 (10th Cir. 1994); *United States* v. *Thomas*, 991 F.2d 206, 212 (5th Cir.), cert. denied, 510 U.S. 1014 (1993); *United States* v. *Cassidy*, 899 F.2d 543, 549 n.13 (6th Cir. 1990).[4] Against that backdrop, the parenthetical's obvious im-

[4] Although petitioner sometimes portrays those decisions as holdings on the question presented here (Pet. Br. 21-22), they are not. *Cassidy* held that the defendant was not entitled to the Section 921(a)(20) exemption because, while his rights were restored "after his release from prison," the State expressly precluded him from possessing a firearm. 899 F.2d at 550. *Hall* and *Thomas* held, in keeping with this Court's subsequent decision in *Caron*, 524 U.S. at 313, that rights could be restored automatically by operation of law. See *Hall*, 20 F.3d at 1069; *Thomas*, 991 F.2d at 213. In doing so, the *Hall* court recognized that "the word 'restored' certainly implies action of some kind by the state," which suggests that it would view mere retention of rights as insufficient to invoke the exemption. 20 F.3d at 1069.

port is to *clarify* the meaning of "restored" in the new statute, not to *change* the meaning of that term in the earlier statute, which Congress did not amend. That inference is further strengthened by Congress's use of a parenthetical phrase (a parenthetical, after all, being where one expects clarifying language). Cf. *Commissioner* v. *Connelly*, 338 U.S. 258, 261 (1949) (treating parenthetical as having clarifying effect).[5]

The surplusage canon invoked by petitioner is inapposite where, as here, the relevant language "performs a significant function simply by clarifying" the statute's meaning. *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007); accord *O'Gilvie* v. *United States*, 519 U.S. 79, 89-90 (1996); *United States* v. *Vonn*, 535 U.S. 55, 71 (2002); *Amoco Prod. Co.* v. *Watson*, 410 F.3d 722, 734 (D.C. Cir. 2005) (Roberts, J.), aff'd *sub nom. BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638 (2006). (Nor is it clear that the clarifying parenthetical is surplusage, because it might also be read to indicate that the restoration must relate to the underlying offense —*i.e.*, that a conviction by "the applicable jurisdiction" counts even if another jurisdiction revoked and restored the defendant's civil rights. 18 U.S.C. 921(a)(33); cf. *Beecham*, 511 U.S. at 370-371 (interpreting Section 921(a)(20) in that manner).) In any event, the surplusage canon is "not absolute," and yields to plain statu-

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[5] The sponsor of the legislation that became Section 921(a)(33) explained that its restoration-of-rights provision "mirrors similar language in current law that applies to those convicted of felonies." 142 Cong. Rec. 26,675 (1996) (remarks of Sen. Lautenberg). He further noted that because "[l]oss of these rights generally does not flow from a misdemeanor conviction," the restoration-of-rights provision "is probably irrelevant to most, if not all, of those offenders" who had been convicted of misdemeanor crimes of domestic violence. *Ibid.*

tory language like that at issue here. *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 536 (2004).

C. The Absence Of Legislative History Directly On Point Does Not Justify A Departure From The Statute's Plain Meaning

Petitioner argues (Pet. Br. 17-18) that the statute should not be read according to its terms because the legislative history is silent on the question presented here. That inversion of the normal rules of *statutory* construction is misplaced for numerous reasons.

1. Even if the legislative history specifically addressed the question presented, it could not override the unambiguous statutory text. *E.g.*, *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 567-568 (2005). If legislative history addressing a question cannot justify departing from a statute's unambiguous text, it would seem to follow *a fortiori* that the *absence* of such history certainly cannot do so, as the court of appeals observed. *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005); J.A. 29. "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute." *Harrison* v. *PPG Indus.*, 446 U.S. 578, 592 (1980). Congress is, after all, undr no obligation to generate legislative history.

2. As the court of appeals explained, petitioner is therefore forced to argue not only that silence in the legislative history indicates that Congress did not consider the precise question before the Court, but also that this Court should amend the statute to address the question in the manner it thinks Congress would have "had it thought" more specifically about it. J.A. 33-34; see Pet. Br. 17.

a. No matter how much weight one would ordinarily give to legislative history, petitioner's approach—what the court of appeals called "imaginative reconstruction"—is "democratically illegitimate, for it sets up the judiciary as the effective lawmakers" contrary to Congress's clearly expressed intent. J.A. 33. In *Beecham*, for example, this Court acknowledged that a provision of Section 922(g) might have been an "accident[] of statutory drafting" and that Congress may have "never considered" the issue at all. 511 U.S. at 374. But the Court explained that "our task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider petitioners' particular cases. Rather, it is to determine whether the language the legislature actually enacted has a plain, unambiguous meaning." *Ibid.*; accord J.A. 31, 33 (citing cases). In any event, even putting such methodological disputes to one side, Congress's approach to the issue in the analogous context addressed by Section 921(a)(33) strongly suggests that petitioner's "guess about what Congress 'would have done, had it thought' turns out to be wrong." J.A. 34.

Petitioner's reliance (Pet. Br. 18) on *Small* v. *United States*, 544 U.S. 385 (2005), is misplaced. In *Small*, the question was whether the phrase "convicted in any court" in Section 922(g)(1) includes convictions in foreign courts. The statutory text and legislative history were silent on that issue and there was "no reason to believe that Congress [had] considered [it]." *Id.* at 394. In that setting, this Court applied a variant of the "ordinary assumption" that a statute does not apply extraterritorially. *Id.* at 390-394. By contrast, petitioner does not ask this Court to interpret ambiguous statutory lan-

guage narrowly, and no canon analogous to the presumption against extraterritoriality applies here.

b. Moreover, it is inappropriate to presume that Congress was unaware that some affected defendants would retain their civil rights following state convictions. Absent "affirmative evidence" to the contrary, this Court presumes that "Congress is knowledgeable about existing law"—including state law—"pertinent to the legislation it enacts." *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). That presumption is especially forceful where, as here, the very purpose of the amendment was to give effect to state-law pardons, expungements, set asides, and restorations of rights. By invoking all four of those options, Congress manifested a knowledge of the varying state procedures.

Indeed, Congress enacted the relevant amendment to Section 921(a)(20) partially in response to this Court's decision in *Dickerson*, which had held that a State's expungement of a conviction did not nullify the conviction for purposes of the firearms disability, 460 U.S. at 114-122. See *Caron*, 524 U.S. at 316; S. Rep. No. 583, *supra*, at 7 n.16. *Dickerson* reasoned in part that state expunction statutes "vary widely from State to State," 460 U.S. at 120, creating "nothing less than a national patchwork," *id.* at 122. The Court observed that not every State had enacted an expungement provision and that, among States that had done so, the provisions differed "in almost every particular." *Id.* at 121. In abrogating *Dickerson*, Congress obviously knew, as *Dickerson* had made clear, that state laws varied widely and that reliance on state law would produce anomalous outcomes. *Beecham*, 511 U.S. at 373; *Jennings*, 323 F.3d at 274; *Smith*, 171 F.3d at 625.

That conclusion is further buttressed by Congress's simultaneous amendment of Section 925(c), which, as discussed above, permits convicted persons to petition the Attorney General for removal of the firearm disability. Congress amended Section 925(c) to make it applicable to all crimes, including (for the first time) crimes involving firearms. See FOPA § 105(1)(A), 100 Stat. 459. According to the Senate Report, Congress broadened the Section 925(c) "safety valve" in order to protect "persons who might otherwise be more trustworthy than those eligible." S. Rep. No. 98-583, *supra*, at 26. In other words, Congress was aware that reliance on state law would produce anomalous outcomes, and it addressed that issue through the Section 925(c) "safety valve," not by broadening the Section 921(a)(20) exemption beyond its current form.[6]

D. The Canon Against Absurdities Is Inapposite

Petitioner invokes (Pet. Br. 24-34) the canon against absurdities, which applies when a statute's text would lead to "patently absurd consequences," *United States* v. *Brown*, 333 U.S. 18, 27 (1948), such that "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819) (Marshall, C.J.); see *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 470-471 (1989) (Kennedy, J., concurring in judgment) (explaining that the canon applies

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[6] While petitioner notes (Pet. Br. 23 n.15) that subsequent Congresses have declined to fund the Section 925(c) petition process, such that the safety valve has not been available in recent years, that is irrelevant to the intent of the enacting Congress or the structure of the statute it enacted.

only "where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone") (citation omitted). That canon is inapplicable here.

1. This Court has applied the canon against absurdities in interpreting ambiguous statutes that are susceptible to two or more interpretations because it is likely that Congress intended the non-absurd interpretation. See, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 428-429 (1998); *United States* v. *Granderson*, 511 U.S. 39, 56 (1994). This Court has also read broad or general terms narrowly because it is unlikely that Congress foresaw an absurd application of general language, such as where a sheriff was prosecuted for obstructing the mails even though he was executing a warrant to arrest the mail carrier for murder, or where a medieval law against drawing blood on the streets was to be applied against a physician who had come to the aid of a man who had fallen down in a fit. *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 450-461 (1892) (citing cases); see *Public Citizen*, 491 U.S. at 455.

Petitioner's absurdity argument is an unusual one. His contention is not that what Congress did was absurd, but that it would be absurd for Congress to have done what it did without extending similar relief to petitioner. In other words, petitioner asserts (Pet. Br. 26-33) that it would be absurd to exempt defendants whose civil rights were restored and not defendants whose civil rights were retained. As discussed above, however, there is significant contextual evidence that Congress intended to do just that, and did so knowing that reliance on state law would produce anomalies. See pp. 13-16, 24-25, *supra*. As such, judicial broadening of the

exemption would be inconsistent with congressional intent.

In all events, Congress's approach to this issue in Section 921(a)(33) is clearly fatal to petitioner's absurdity argument. Congress expressly required, in that closely related context, the very result that petitioner now argues is absurd. See pp. 19-23, *supra*. Whatever petitioner might think of that policy choice, Congress's express adoption of it forecloses the argument that it is "quite impossible that Congress could have intended the result." *Public Citizen*, 491 U.S. at 471 (Kennedy, J., concurring in judgment).

2. Even setting those points to the side, petitioner has identified at most an anomaly, not an absurdity. There is a difference; mere anomalies are not absurdities. See *Carter* v. *United States*, 530 U.S. 255, 263 (2000). That point has particular force here because, as the court of appeals explained, anomalies are "inherent in the legislative choice to make federal sentences depend on the states' differing * * * approaches to revoking and restoring civil rights." J.A. 35-36; accord *McGrath*, 60 F.3d at 1009. In this context, therefore, anomalies are inevitable consequences of Congress's intent, not absurdities that call its intent into question.

a. Petitioner argues (Pet. Br. 23-24) that if a State permits persons to retain civil rights, it must view them as more trustworthy to possess firearms than persons it deprives of civil rights it later restores. That is not necessarily true—some States do not deprive misdemeants of the civil rights to vote, serve on juries, or hold public office, but do deprive at least some misdemeanants of the right to possess firearms. See, *e.g.*, Fla. Stat. § 790.06(3) (2007); Conn. Stat. 29-28(b)(2) (2003).

In any event, petitioner's point misperceives the statutory structure because it relates to the seriousness with which the State views the offense (the principal concern of, *inter alia*, Section 921(a)(20)(B)), not whether the State later extends a measure of forgiveness by changing the defendant's legal status (the issue addressed in the final sentence of Section 921(a)(20), on which petitioner relies). There is nothing irrational about Congress's two-step approach, which first considers the seriousness of the offense based on criteria other than retention or restoration of civil rights, and then defers to a State's determination to relieve a defendant of some or all of the consequences of his conviction.

b. If a defendant cannot invoke the restoration-of-rights provision because his rights were never revoked, he can still pursue a pardon, set aside, or expungement. As this Court explained in *Beecham*, Congress did not expect that "felons convicted by all jurisdictions [would] have access to all the procedures (pardon, expungement, set-aside, and civil rights restoration) specified in the exemption clause." 511 U.S. at 373. Rather, this Court recognized that a person convicted in federal court could not obtain restoration of civil rights because there is no federal procedure for restoring those rights. *Id.* at 372. The Court emphasized, however, that for purposes of Section 921(a)(20), "a person convicted in federal court is no worse off than a person convicted in a court of a State that does not restore civil rights." *Id.* at 373. Likewise, a person who was not deprived of civil rights is no worse off for this purpose than a person who was convicted in a State that deprived him of civil rights but did not restore those rights.

At a minimum, convicts appear to be able to seek pardons in all States. See NACDL Lodging App. 1.

Petitioner argues (Pet. Br. 27, 29) that in Wisconsin pardons are granted for misdemeanors only in extraordinary circumstances, and that pardons are rarely granted in some other States. But whether to forgive a defendant, by pardon or otherwise, rests with the State. If anything, the differing grant rates for pardons in different States only underscore that Congress was not focused on ensuring uniformity, but rather that its partial reliance on the States' determinations made anomalies inevitable.[7]

c. Moreover, neither petitioner nor his *amici* have identified any significant anomalies. They argue (NACDL Br. 12) that in six States, persons convicted of less serious crimes are treated the same as persons with more serious convictions because they must all seek pardons to benefit from Section 921(a)(20). But it is hardly an anomaly that federal law does not draw distinctions among sufficiently serious crimes based on their relative seriousness.

Amici also argue (NACDL Br. 12, 21) that in six jurisdictions—Florida, Iowa, Louisiana, North Dakota, South Dakota, and Wisconsin—persons convicted of less serious crimes are disadvantaged vis-a-vis those convicted of more serious crimes because at least some persons convicted of more serious crimes have their rights revoked and automatically restored, while at least some

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[7] Wisconsin eliminated any arguable anomaly prospectively because it no longer has misdemeanors punishable by more than two years of imprisonment, and thus no longer has any misdemeanors that qualify as ACCA predicates. Effective February 1, 2003, after petitioner was convicted of his misdemeanor battery offenses, Wisconsin reduced the maximum penalty for that crime to two years of imprisonment, thereby disqualifying that crime as an ACCA predicate. See Wis. Stat. § 939.62(1)(a) (2005), amended by Wis. Act 109 S.B. 1, § 562.

persons convicted of some less serious crimes do not lose their civil rights and thus may benefit from Section 921(a)(20) only if they obtain a pardon, expungement, or set aside. In three of those States, any such anomaly no longer exists. Iowa no longer restores felons' civil rights automatically. See Iowa Exec. Order No. 42 (2005). And Florida and Wisconsin no longer appear to have misdemeanors punishable by more than two years of imprisonment. See NACDL Lodging App. 1 at 18, 33-34; p. 29 n.7, *supra*.

Nor is there a significant anomaly in the other three States because most felons in those States lose the right to possess firearms under state law and there are significant restrictions on the restoration of that right. In South Dakota, for example, the right to possess firearms is restored only after 15 years, and only if the defendant has had no further convictions. S.D. Codified Laws § 22-14-15 (2006). Considering that South Dakota evidently grants approximately half of all pardon requests (see NACDL Lodging App. 3, at 18), misdemeanants may be able to receive pardons long before felons regain their firearms rights. In Louisiana, felons' firearm rights are restored only after ten years and only if a defendant had no further felony convictions. La. Rev. Stat. § 14:95.1(c) (2004). North Dakota also has a ten-year waiting period. N.D. Code § 62.1-02-01(1) (2003). And in all of those States, anyone may seek a pardon. See pp. 28-29, *supra*.*

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* In the District of Columbia, Colorado, Connecticut, Maryland, and Nebraska, felons and misdemeanants are on the same footing because felons are prohibited from possessing firearms under those States' laws unless they obtain a pardon. See NACDL App. 1, at 16, 17, 24, 27. Thus, felons and misdemeanants alike must obtain a pardon to take advantage of the Section 921(a)(20) exemption. When Wisconsin

Indeed, the adoption of petitioner's legal position would create greater anomalies than any he has identified in the court of appeals' interpretation. As the Second Circuit explained, "the most dangerous felons in a state that elected not to forfeit civil rights would be exempted from the federal prohibition, while those convicted of far less serious crimes in other states would not be exempted unless they were lucky enough to receive the benefits of an act of grace." *McGrath*, 60 F.3d at 1009. It appears that at least one State, Maine, does not deprive *any* convicted criminals of civil rights. See NACDL App. 1, at 23.[9] Under petitioner's position, therefore, *all* Maine crimes, including first-degree murder, would be treated as crimes for which civil rights had been restored, while much less serious crimes committed in other States would not. Even if the canon against absurdities otherwise applied in this case, it would make little sense to invoke the canon to choose one anomaly over another, especially considering the clarity of the statutory text and structure.

E. There Is No Basis For Resort To The Rule Of Lenity

Finally, petitioner's resort to the rule of lenity is misplaced. That rule applies only if, "at the end of the process of construing what Congress has expressed," including the use of ordinary tools of statutory construction, *Callahan* v. *United States*, 364 U.S. 587, 596 (1961),

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had misdemeanors punishable by more than two years, felons were likewise required to obtain a pardon to possess firearms. Wis. Stat. § 941.29(1), (2)(a), 5(a) (2005).

[9] In Maine, a defendant loses firearms rights upon conviction of a crime punishable by imprisonment for at least one year, but may apply for a firearm permit five years after completing his sentence. Me. Rev. Stat. tit. 15 §§ 393(1)(A-1)(1), 393(2).

"there is a grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citations omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity is * * * sufficient to warrant application of [the] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citations omitted).

There is no need to resort to the rule of lenity because no grievous ambiguity prevents the Court from making more than a guess about Congress's intent. Rather, as discussed above, the statute's text is clear and its plain meaning is buttressed by the statutory structure and context.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JAMES D. LOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF

Respondent rests its argument on the plain meaning of the word "restored." But reciting the definition of "restored" from five separate dictionaries does not, as Respondent hopes, dispose of the issue. The word "restored" considered alone cannot answer the question before the Court. Nor is it answered by repeated explanations that "retained" does not have the same meaning as "restored." Rather, the question is whether the exemption clause should be interpreted to exclude convictions for which civil rights were retained or for which some were restored and some were retained. While the language of the statutory text is the starting point of the Court's analysis, it does not end there. The Court will look outside the plain language when that language leads to absurd consequences that Congress could not possibly have intended. See, *e.g.*, *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring). Additionally, the Court must read the provision in the context of "the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006). Respondent fails to contradict Petitioner's contention that excluding convictions for which civil rights were retained is absurd with any argument that has not already been rejected by this Court. In the end, Respondent's vigorous defense of the word "restored" rings hollow in light of the common sense application of the statute as informed by this Court's precedent, the legislative history of FOPA, and the surrounding statutory provisions.

I. A SENSIBLE READING REQUIRES THE INCLUSION OF CONVICTIONS FOR WHICH CIVIL RIGHTS WERE RETAINED.

The term "crime punishable by imprisonment for a term exceeding one year" defines a predicate conviction for purposes of the federal firearms statute. 18 U.S.C. § 921(a)(20) (2006). It is meant to identify dangerous

individuals who should be subject to the federal firearms prohibition and increased penalties. See *Small* v. *United States*, 544 U.S. 385, 390 (2005). Section 921(a)(20)(B), for example, specifies that state *misdemeanors* punishable by two years or less do not make a person dangerous for purposes of federal law and excludes outright such convictions. Respondent argues that Petitioner's interpretation of the exemption clause encompasses essentially the same inquiry as § 921(a)(20)(B). Resp. Br. 15-16. This contention is both factually and conceptually misplaced. Not all misdemeanors punishable by more than two years result in a loss of civil rights. See *e.g.*, NACDL App. 1 at 24, 33 (citing Maryland and Wisconsin). Under § 921(a)(20), more importantly, subsection (B), the exemption clause and the unless clause are each a distinct step in determining what counts as a conviction for purposes of the federal firearms statute. Even if a state misdemeanor conviction is punishable by more than two years, § 921(a)(20) exempts that conviction if both the exemption clause and unless clause are satisfied.

Respondent argues that "if the States' general trustworthiness determinations controlled who could possess firearms under federal law, the federal prohibition would be at most 'a sentence enhancement' for the violation of state-law prohibitions against possession of firearms — 'a result inconsistent with . . . congressional intent,' as this Court recognized in *Caron*." Resp. Br. 18 (alteration in original). But Respondent blurs the inquiries of the exemption clause and unless clause. Petitioner is not attempting to "substitute" a general "trustworthiness" rationale for the text of § 921(a)(20). Such a general trustworthiness rationale would simply rely on whether an offender is allowed to possess a firearm under state law. Clearly, § 921(a)(20) requires more.

The exemption clause includes convictions that have been expunged or set aside or for which a person has been pardoned or has had civil rights restored. 18 U.S.C. § 921(a)(20). Justice Thomas' uncontroverted description of

the import of restoration of civil rights was that "[i]n restoring those rights, the State has presumably deemed such ex-felons *worthy of participating in civic life.*" *Caron* v. *United States*, 524 U.S. 308, 318 (1998) (Thomas, J. dissenting) (emphasis added). Justice Thomas thus acknowledged that the exemption clause's inquiry is a *state-based* one. In fact, the majority also acknowledged that, unlike the unless clause where federal law imposes its own broader stricture, state law controls the exemption clause and restorations of civil rights in particular. *Id.* at 316. Thus, with regard to the exemption clause, the inquiry *only* takes place at the state level. See also *Beecham* v. *United States*, 511 U.S. 368, 371 (1994).

Furthermore, the subject of the inquiry is whether a state deems a person *worthy of participating* in civic life. Of import here, the exemption clause hinges on whether, despite otherwise qualifying as a conviction under § 921(a)(20)(B), a state allows an offender to participate fully in civic life. Petitioner's reading of the exemption clause gives effect to the state's rule in making this determination by asking whether the state deems an offender worthy of participating in civic life, not only whether there has been an affirmative act of forgiveness at a later time. See *United States* v. *Indelicato*, 97 F.3d 627, 630 (1st Cir. 1996) ("[t]o key the federal statute to these civil rights makes sense only on one assumption: that Congress thought of the attribution of these rights as expressing 'a state's judgment that a particular person or class of persons is, despite a prior conviction, sufficiently trustworthy to posses firearms.'") (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1009 (2d Cir. 1995)). The process by which an offender is allowed to participate is irrelevant — participation alone is the touchstone.

This Court's analysis of the unless clause in *Caron* informs the understanding of the proper application of the exemption clause. In *Caron*, the Court confronted the question of whether, for purposes of the federal statute, a state has expressly provided that a person may not possess firearms if

the state only partially banned a person's firearms right. The Court decided that because the state imposed a partial firearms ban and did not fully restore Caron's firearms rights, "[t]he State has singled out the offender as more dangerous than law-abiding citizens, and federal law uses this determination to impose its own broader stricture." *Caron*, 524 U.S. at 315. Thus, even when the Court determined that the statute required a further federal stricture, it still looked to the convicting state's determination that a person was dangerous enough to warrant imposition of that stricture.

Petitioner's case (although it concerns only the exemption clause) is the other side of the *Caron* coin. Petitioner was not singled out by Wisconsin as "dangerous" as a result of his misdemeanor convictions. Instead, by allowing him to retain his civil rights, the state of Wisconsin determined that, with respect to his worthiness to participate in public life, he was no different than its other law-abiding citizens. For purposes of the exemption clause, Wisconsin's considered decision cannot be wholly dismissed without reinstating an entirely federal framework that Congress plainly rejected. See NRA Br. 19-21. Wisconsin signaled to the federal statute that Petitioner's convictions were not serious enough to qualify as "convictions" because it allowed him to participate in civic life.

II. THE EXEMPTION CLAUSE DOES NOT REQUIRE A SUBSEQUENT ACT OF FORGIVENESS.

Contrary to the obvious substantive inquiry of the exemption clause, Respondent reads it to require an "action" "subsequent" to the conviction that is "specific" and "formal" in "extend[ing] a measure of forgiveness" that relieves him "from the consequences of his conviction." Resp. Br. 15. But this interpretation of the statute is no more tethered to its plain language than Petitioner's. Just as the word "trustworthy" does not appear anywhere in the language of the statute, *id.* at 18, neither do the words "subsequent action"

or "measure of forgiveness" appear anywhere in the statutory language. *Id.* at 15. Further, Respondent fails to acknowledge that most civil rights are "restored" by operation of law, through some distant corner of a statute book that offenders never see, a reality that is distinct from Respondent's conception of a "specific" extension of "a measure of forgiveness" to individual offenders. *Id.*

This Court has already acknowledged that there is no difference between a restoration "by operation of law rather than by pardon or the like." *Caron*, 524 U.S. at 313. Indeed, "[n]othing in the text of § 921(a)(20) requires a case-by-case decision to restore civil rights . . . [w]hile the term 'pardon' connotes a case-by-case determination, 'restoration of civil rights' does not . . . and federal law gives effect to its rule." *Id.* But Respondent clings to its conception that a specific, formal act of forgiveness is required to satisfy the exemption clause. Resp. Br. 14-15. Respondent's argument mirrors the reasoning of the holding of *United States* v. *Ramos*, 961 F.2d 1003, 1006-08 (1st Cir. 1992), *overruled by United States* v. *Indelicato*, 97 F.3d 627 (1st Cir. 1996), which the Second Circuit relied upon in *McGrath* v. *United States*, 60 F.3d 1005 (2d Cir. 1995). It stated: "[t]he point is not just that civil rights were never lost, but that, following conviction, such rights were *affirmatively 'restored.'*" *Ramos*, 961 F.2d at 1008 (emphasis added). However, the First Circuit subsequently overruled *Ramos* in *Indelicato*. No circuit has adopted *Ramos*' reasoning. For example, in rejecting the *Ramos* line of reasoning, the Fifth Circuit commented

> the First Circuit [in *Ramos*] flatly requires an 'affirmative[] restor[ation]' of civil rights if the defendant is to come within the ambit of § 921(a)(20); that court simply refuses to address the rhetorical question 'how could a jurisdiction ever "restore"' civil rights to a felon or misdemeanant whose rights were never forfeited?

United States v. *Thomas*, 991 F.2d 206, 212 (5th Cir. 1993) (footnote omitted). The Fifth Circuit continued,

> '[i]f Congress intended to require an individual affirmative act of restoration by the state, Congress could have so provided.'. . . we find ourselves unable to embrace an interpretation that results in convicting a person under § 922(g) who has never lost his civil rights and who is not prohibited by the state from possessing a gun.

Id. (quoting *United States* v. *Gomez*, 911 F.2d 219, 221 (9th Cir. 1990)). Thus, § 921(a)(20) does not require any affirmative act of forgiveness. Any argument to the contrary has been dismissed by every circuit addressing the issue since *Indelicato*.

States have numerous methods by which they may render prior convictions beyond the reach of the enhancement statute. Section 921(a)(20) itself lists pardoning, expunction and restoration of rights as three options. Respondent suggests that what unites these three (and, by corollary, what makes retained rights different) is that the convicted felon becomes the subject of an "act of forgiveness" on the part of the state. But to differentiate between restoration and retention because the former supposedly involves an affirmative act is to ignore the reality of the restoration process. Each of these methods for dealing with these civil rights issues reflects considered and careful judgments about trustworthiness, public safety, and forgiveness in the context of different offenses. It is neither respectful of these judgments nor fair to cleave an artificial distinction between a subsequent act of forgiveness (*i.e.*, restoration) and an original or affirmative act of forgiveness (*i.e.*, retention). Retention of civil rights is just as much an act of forgiveness as is restoration of those rights.

Contrary to Respondent's characterizations, the state does not restore felons' rights through a volitional, case-specific

act. Rather, such rights are restored by a mechanical, *pro forma* operation of law that requires no bureaucratic inputs from the state. Often, civil rights are automatically restored after a statutorily specified number of years have elapsed, without any affirmative act by either the state or the convict. Thus, a broad legislative determination that persons who commit certain crimes nevertheless deserve to retain their civil rights is just as much an "affirmative act" as is automatic restoration of them after they have been deprived. Respondent's mischaracterization of this process is convenient but disrespects the state's choice with regard to how the civil rights of felons should be handled. To describe restoration as an "act" is to attach a label that gives the process more significance that it actually entails. Accordingly, each of respondent's attempts to give definition to what is meant by "restoration" in this context only demonstrates that such definitions are artificial and neither reflect nor respect what the States have done.

Respondent's assertion that a meaningful difference exists between restoration by operation of law and retention by operation of law fails for additional reasons. Certainly, Respondent must agree that in order to satisfy the exemption clause's restoration of civil rights provision, an offender must *possess* all three civil rights after conviction. It insists that at least two civil rights must be taken away and restored in order for the exemption to operate. Resp. Br. 12-13. Yet, if only two civil rights are taken away and restored and the third civil right was not taken away then Respondent's reading of the exemption clause would conclude that right has not been "restored." Respondent agreed in *Caron*, however, either explicitly or implicitly, that two rights restored and one retained was sufficient to allow the prior conviction to fall within the exemption clause. *Caron*, 524 U.S. at 313. Beyond this inconsistency, Respondent offers no explanation as to why two rights must be restored rather than one or three. Further, it is not entirely clear which rights are either removed

or retained. Some may be suspended, for example, when an offender is incarcerated. "Suspended" is defined as: "to cause to stop for a period; interrupt. . . to render temporarily ineffective." *American Heritage Dictionary of the English Language* (4th ed. 2004). Suspended rights, therefore, are not "lost" or "taken away", so they cannot be restored under Respondent's interpretation. See Resp. Br. 10-11.

As another example, offenders in Wisconsin like Petitioner, do not lose their right to serve on a jury. While incarcerated, however, Petitioner certainly loses that right in a practical sense. Of course, when Petitioner finished his term of incarceration he could both formally and practically serve on a jury. Respondent argues that the restoration must "relieve[] [the offender] of some or all of the consequences of his conviction." *Id.* at 14. Clearly, one consequence of being incarcerated, even if the right to serve on a jury is technically retained, is that an offender cannot practically serve on a jury. Respondent's reading of the statute would preclude a finding of restoration in this practical sense as well, even though it may well satisfy dictionary definitions. *Id.* at 10-11.

III. ABSURD RESULTS

Respondent further contends that Petitioner's position would produce anomalous results where offenders who might have committed more serious crimes retain their civil rights by operation of law and are therefore exempted. Yet, Respondent concedes that its own position produces anomalous results because individuals who have committed more serious crimes than Petitioner may nonetheless have their rights restored, whereas misdemeanants who never lost their rights must suffer enhanced sentencing. Resp. Br. 27. Such unfairness is not just irregular, but wholly incongruous and unreasonable, especially in light of Congress's obvious effort to respect the states' peculiar decisions as to how to handle offenders and their civil rights. Respondent therefore mischaracterizes the issue as a matter of "choos[ing] one anomaly over another," *id.* at 8, 31, when the only choice is to

avoid an absurd result stemming incomplete drafting in an otherwise complicated statutory scheme. At bottom, Respondent's "choice of anomalies" inevitably disregards the state's decision not to strip Petitioner of any civil rights; instead, it confers upon him the federal status of violent offender.

Respondent attempts to undermine Petitioner's absurdity claim by arguing that its own potential anomaly would arise in only three states. Resp. Br. 30. Interestingly, Respondent does not include Wisconsin on that list, ostensibly for the reason that Wisconsin no longer has misdemeanors punishable for more than two years. Therefore, no current misdemeanor can qualify as a predicate under § 921(a)(20)(B).[1] But this change does not benefit Petitioner. Respondent fails to recognize that the ACCA reaches back to convictions without a time limit. Therefore, while a state's current law may not lead to absurd consequences under the federal statute, its prior laws might. Indeed, this is precisely why Petitioner is before this Court. While waiting periods for firearms reinstatements of 10 or 15 years may seem distant to Respondent, Petitioner's convictions are nearly 20 years in the past and certainly still matter for ACCA purposes. In addition, Respondent cites the rationale from *McGrath* that under Petitioner's interpretation

> the most dangerous felons in a state that elected not to forfeit civil rights would be exempted from the federal prohibition, while those convicted of far less serious

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[1] Wisconsin amended its laws in 2001, whereby under current law Petitioner's prior convictions would be punishable by only two years, not three years, thereby disqualifying those offenses under the federal law. Despite the government's implication to the contrary, Wisconsin's revisions of its laws had nothing to do with being mindful of the federal statute, but instead were amended under a "truth-in-sentencing" reform. *See* Wis. Stat. § 939.62(1)(a) (2001), *amended by* Wis. Act. 109 (S.B.1), § 562 (eff. Feb. 1, 2003).

> crimes in other states would not be exempted unless they were lucky enough to receive the benefits of an act of grace.

McGrath, 60 F.3d at 1009. Respondent's argument misses the point. In essence, Respondent argues that Petitioner's interpretation creates the anomaly that serious offenders in one state do not lose civil rights, while less serious offenders in another state do.[2] But anomalies from state to state are irrelevant. Indeed, disparities from state to state are inherent in a system that is based on federalism and deference to state choices respecting civil rights and offenders. What is relevant is whether federal law creates an absurdity *within* a particular state, as it does here. To be sure, such absurdities will arise in all states where civil rights are retained by offenders whose crimes fall within the technical definition of a violent felony (*e.g.*, a misdemeanor with a maximum sentence of more than 2 years). See generally NACDL Brief. Most importantly, any "anomalies" created by the common sense application of FOPA's exemption clause, at the very least, respect a state's determination that, despite a conviction, an offender is trustworthy enough to participate fully in civic life, and possess all firearms under state law.

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[2] Respondent observes that all offenders in Maine retain their civil rights and asserts that Petitioner's interpretation creates an anomaly because no Maine felonies could qualify as predicate crimes. Resp. Br. 31. The assertion is inaccurate because felons and any offender in Maine (whether misdemeanant or felon) who uses a dangerous weapon during the offense loses their firearm rights. NACDL App. 1, at 23. The "unless" clause, and Caron's reading of that clause, makes all such convictions qualifying predicates. Accordingly, Petitioner's interpretation creates no serious anomaly and, unlike Respondent's interpretation, preserves respect for the state determination as to how offenders should be treated with regard to their civil rights.

IV. CONGRESS DID NOT CONSIDER THE UTILITY OR DISUTILITY OF EXCLUDING RIGHTS RETAINED FROM THE EXEMPTION CLAUSE.

Petitioner argues that the statute and the legislative history are silent as to how to treat convictions for which civil rights were retained. Respondent counters that "a law cannot be judicially amended because Congress did not confirm its plain meaning in legislative history." Resp. Br. 8. Yet, in a similar context Congress had not confirmed the plain meaning of "in any court" in the legislative history at issue in *Small*. The Court nonetheless found significance in the silence and determined that it had "no reason to believe that Congress considered the added enforcement advantages flowing from inclusion of foreign crimes." *Small*, 544 U.S. at 394. It based its conclusion in part because the "lengthy legislative history confirms the fact that Congress did not consider whether foreign convictions should or should not serve as predicate to liability under the provision here at issue." *Id.* at 393. The Court added that "those who use legislative history to help discern congressional intent will see the history here as silent, hence a neutral factor, that simply confirms the obvious, namely, that Congress did not consider the issue." *Id.* Thus, the fact that Congress had not confirmed the plain meaning of "in any court" in the legislative history supported the Court's conclusion that it should narrowly interpret the application of the statute.

Petitioner similarly asks the Court to interpret 18 U.S.C. § 921(a)(20) narrowly so that crimes are not included as predicates where Congress plainly gave no consideration as to whether they should. Just as there was no reason to believe Congress considered the inclusion of foreign convictions in *Small*, there is no indication here that Congress considered excluding from the exemption clause convictions for which civil rights were retained.[3] FOPA's explicit abrogation of

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[3] The First Circuit has so noted:

Dickerson v. *New Banner Inst., Inc.*, is, however, evidence that Congress intended a broad reading of the exemption clause, and, thus, a narrow reading of what qualifies as a predicate conviction. 460 U.S. 103 (1983), *superseded by statute*, 18 U.S.C. § 921, *as recognized in Caron* v. *United States*, 524 U.S. 308 (1998). And when the history of a statute reveals that "an unthinkable [result] was indeed unthought of," the Court should avoid applying the statute in a way that attributes to Congress an absurd conclusion. *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (internal parenthetical omitted).

V. THE PURPOSE OF FOPA COUNSELS INCLUSION OF RIGHTS RETAINED IN THE EXEMPTION CLAUSE.

FOPA's abrogation of *Dickerson* further illuminates the absurdity of excluding rights retained from the exemption clause. In reaching its decision in *Caron* as to whether a partial state gun ban satisfied the unless clause, the Court acknowledged that "either reading [of whether the unless clause is satisfied by a state's partial gun ban] creates incongruities," but that *Caron*'s approach yielded "results contrary to a likely, and rational, congressional policy." 524 U.S. at 315. Here, the likely and rational congressional policy is known. Congress enacted FOPA in part because the

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> The incidents that gave rise to the amendment (in particular, *Dickerson*), and what Congress thought to be the ordinary case, involved the deprivation of civil rights and their subsequent restoration (*e.g.*, by pardon). Indeed, there is no indication in the legislative history that Congress gave any attention to the rare case in which someone convicted of a serious crime would not lose one or more of the three civil rights that have been used by most courts as touchstones under this section.

Indelicato, 97 F.3d at 629. That Congress was operating on the assumption that civil rights are lost by offenders in all cases finds support in Senator Sasser's comments during debate that convicted felons "lose most civil rights-to vote, hold office, and so on . . . ." 131 Cong. Rec. S9101-05 (daily ed. July, 9 1985).

Court's decision in *Dickerson* held that a state expunction did not erase a conviction for purposes of serving as a predicate conviction for federal law. 460 U.S. at 106. Congress thus ensured that "convicted felon" status would turn on state law. To achieve that end, FOPA amended the gun statutes by enacting the current language in § 921(a)(20). In *Caron*, the Court avoided the bizarre result of ignoring a state's determination that a person could not possess a firearm and therefore presented more risk than other law-abiding citizens. 524 U.S. at 317. Similarly, the Court here should not ignore a state's determination that an offender is worthy of participating in civic life. Respondent's position, however, would have the Court do just that — without support from the legislative history and in the face of this Court's prior readings of this statute. Respondent's reading amounts to an attempt to return to a *Dickerson*-ian world that no longer exists.

VI. THE PARENTHETICAL LANGUAGE IN § 921(a)(33)(B)(ii) SUPPORTS THE CONCLUSION THAT RIGHTS RETAINED MUST BE INCLUDED IN THE EXEMPTION CLAUSE.

Respondent is critical of Petitioner's argument that the parenthetical language of § 921(a)(33)(B)(ii) should yield different results than the language of §921(a)(20). Respondent contends that the canon that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that it acts intentionally and purposely in the disparate inclusion or exclusion," *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal citation omitted), "applies only where the two sections are parts of 'the same Act.'" Resp. Br. 20. Yet, in *Small*, Respondent relied upon the very same principle in *Russello* "to interpret parallel provisions of the gun control law," provisions of law passed by different Congresses; the very same principle it now argues Petitioner may not invoke. See Br. for United States at 13, *Small* v.

United States, 2004 WL 1844488, No. 03-750 (U.S. Aug. 16, 2004). Indeed, the parenthetical language in the § 921(a)(33) exemption must be given some effect. Otherwise, its additional language is superfluous and void. See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997). The Court must "refrain from concluding here that the differing language in the two subsections has the same meaning in each." *Barnhart* v. *Sigmon Coal, Co.*, 534 U.S. 438, 454 (2002) (internal citation omitted).

Respondent offers that Congress may have intended the parenthetical language of § 921(a)(33) to "*clarify* the meaning of 'restored' in the new statute, not to change the meaning of that term in the earlier statute, which Congress did not amend." Resp. Br. 21. This assertion is perplexing on a number of levels. First, in arguing that the obvious import of the parenthetical language of § 921(a)(33) is to clarify the meaning of § 921(a)(20), Respondent strongly suggests that the meaning of the exemption clause in § 921(a)(20) was in need of clarification. Such an argument wholly undercuts Respondent's claim that the language of the statute is plain in all contexts. Second, Respondent acknowledges that Congress did not amend § 921(a)(20)'s exemption clause when it enacted § 921(a)(33). *Id.* at 21. Yet, Congress is presumed to be aware at the time it enacted the Lautenberg Amendment in 1996 (which added § 922(g)(9) and § 921(a)(33) to the gun statutes) that courts such as *Thomas* and *United States* v. *Cassidy*, 899 F.2d 543 (6th Cir. 1990) were interpreting (a)(20) to exempt convictions for which civil rights were retained. It took no action to clarify (a)(20), even though it could have done so by adding the same parenthetical language of (a)(33) to the exemption clause of (a)(20). If, in 1996, Congress thought that (a)(20)'s exemption clause excluded rights retained, then the parenthetical language in (a)(33) would have been unnecessary. By declining to amend (a)(20), Congress placed its imprimatur on Petitioner's interpretation of the exemption clause.

Moreover, despite the proximity and nearly identical language of §§ 921(a)(20) and (a)(33), the two provisions serve two very different purposes. Section (a)(20) defines a predicate offense for §§ 922(g)(1) and 924(e)(1). It applies equally to violent and non-violent felonies and misdemeanors punishable by more than two years. Other than subsection (A), which excludes certain white collar offenses, (a)(20) is non-specific as to the nature of the offense. In stark contrast, (a)(33) applies specifically and exclusively to misdemeanor crimes of domestic violence, a very particularized subset of misdemeanor offenders whom Congress sought to bar from possessing firearms when it enacted the 1996 Lautenberg Amendment, as Senator Lautenberg stated in debate: "This amendment would . . . keep guns away from violent individuals who threaten their own families." 142 Cong. Rec. S10377-01, S10377-78 (daily ed. Sept. 12, 1996). Congress recognized that, unlike offenses typically included within (a)(20)'s reach for which offenders usually lost their civil rights, misdemeanor crimes of domestic violence were usually only punishable by one year or less and did not typically involve the loss of civil rights. If, in 1996, Congress presumably was apprised of interpretations of (a)(20)'s exemption clause that included rights retained, it was necessary for Congress to include in (a)(33) the explicit parenthetical language in order for all domestic violence convictions to qualify. On the other hand, given that (a)(20) applies generally to all types of felonies and misdemeanors punishable by more than two years, it is rational for Congress to have left (a)(20) as it was and with an understanding that the exemption clause encompassed convictions for which rights were retained.[4] In light of *Thomas*, *Cassidy* and other

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[4] In addition, predicate offenses resulting from the aggressive nature of (a)(33)'s explicit exclusion of convictions for which rights were retained are not used for the severe penalties of § 924(e)(1). Only convictions that meet the definition of (a)(20) may be used to impose mandatory minimum sentences of 15 years. This also counsels in favor of a careful reading of

similar decisions prior to 1996, Respondent's suggestion that Congress appended the parenthetical language to (a)(33) in order to clarify (a)(20) is untenable. The only plausible interpretation of this history is that Congress declined to clarify (a)(20) to abrogate these decisions, but made certain they would not reach (a)(33).

CONCLUSION

For the forgoing reasons, the Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand this case for further proceedings consistent with the Court's opinion.

(a)(20) based upon Congress' opposing purposes of FOPA compared to the Lautenberg Amendment.

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IN THE

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JAMES D. LOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

1. The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with nearly 13,000 members, including both public and private defenders, active U.S. military defense counsel, law professors, and judges. NACDL's 90 state, local and international affiliate organizations comprise some 35,000 members in all 50 states and 27 other countries. The American Bar Association recognizes NACDL as an affiliate organization and accords it full representation in its House of Delegates. Founded in 1958, NACDL promotes study and research in the field of criminal law and procedure, disseminates and advances legal knowledge in the area of criminal justice and practice, and encourages the integrity, independence and expertise of criminal defense lawyers in the state and federal courts. To promote the proper administration of justice and appropriate measures to safeguard the rights of all persons involved in the criminal justice system, NACDL files approximately 35 *amicus* briefs a year in state and federal appeals courts, including a least ten *amicus* briefs in this Court, on a variety of criminal justice issues affecting the vital interests of its members and their clients.

2. Families Against Mandatory Minimums (FAMM), founded in 1991, is a national, nonprofit, nonpartisan organization of 13,000 members whose primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by

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[1] No person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of this brief. The brief was not authored, in whole or in part, by counsel for either party. The charts in the Appendix were prepared by Margaret Colgate Love, author of RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (Hein 2006), and with substantial assistance from Sentencing Resource Counsel to the Federal Public and Community Defenders. Petitioner and respondent have consented to the filing of this brief; their written consents have been filed with the Clerk of the Court.

mandatory sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. Its affiliated Foundation carries out tax-exempt educational activities, including the regular filing of amicus briefs in this and other courts. FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient but not greater than necessary to impose just punishment, secure public safety, and support successful rehabilitation.

FAMM's interest in the instant case derives from its conviction that, to the extent mandatory minimum terms are required by law, they must be construed to reach no one other than as the legislature intended and the law plainly provides. FAMM is concerned that the Seventh Circuit's opinion reflects an unlawful extension of the reach of a severe mandatory penalty for a firearms possession offense, in that Congress has determined that the federal firearms disability should not apply to those individuals — such as petitioner Logan — who retain their civil rights and are deemed by their own states to be trustworthy enough to possess a firearm.

SUMMARY OF ARGUMENT

Under 18 U.S.C. § 922(g), a person "convicted" of a "crime punishable by imprisonment for a term exceeding one year" is prohibited from possessing a firearm. The Congress has expressed its policy that this federal firearms disability does not apply to individuals who are deemed by their own states, notwithstanding a criminal conviction, to be trustworthy enough to exercise the rights of a citizen and possess firearms. 18 U.S.C. § 921(a)(20). Under Section 921(a)(20), what constitutes a disqualifying conviction for purposes of Section 922(g) is to be determined under the law of the jurisdiction in which the proceedings were held, with deference given to the States' remedial measures.

In construing the governing federal law, the court below misapplied the choice-of-law and exemption clauses of Section 921(a)(20). The court instead held that some convicted misdemeanants, in states such as Wisconsin which do not take away any civil rights or restrict the possession of firearms on account of misdemeanor convictions, are forever barred by Section 922(g) from possessing a firearm, even though felons in those states are not subject to any such lifetime prohibition. The reading of the statute by the court below is contrary to Congressional intent and leads to an absurd result, as shown by a comprehensive survey of the 50 states and the District of Columbia, discussed at length in this Brief. Applying ordinary tools of statutory construction and considering the state laws that the Congress is presumed to have known when it enacted the federal firearms law, this Brief shows that it was the intention of the Congress in amending Section 921(a)(20) in 1986 to respect state laws that determine the issue whether persons convicted of a crime should be deprived of their ability to possess a firearm.

ARGUMENT FOR AMICI NACDL AND FAMM

A. The Seventh Circuit's Misinterpretation of Section 921(a)(20).

Under federal law, upon conviction for a "crime punishable by imprisonment for a term exceeding one year," a person may not possess a firearm. 18 U.S.C. § 922(g). A knowing violation of that prohibition is punishable as a felony. *Id.* §§ 924(a)(2), 3559(a)(3). A person who commits that federal offense and has a certain number and type of prior predicate convictions is labeled an "Armed Career Criminal" and is subject to a severe mandatory minimum and unlimited maximum sentencing. *Id.* § 924(e)(1). Every state but one deprives its citizens of some or all of the major civil rights – to vote, to serve on a jury, and to hold public office – upon conviction of a serious crime. Most

of those same states by their own laws also deprive their citizens upon conviction of any right to possess firearms. But more than a dozen states do not deprive their citizens of civil rights or of the opportunity to possess a firearm upon conviction for certain offenses, particularly for some or all less serious crimes. Through a complex definition of the phrase "crime punishable by imprisonment for a term exceeding one year," *id.* § 921(a)(20), Congress has expressed its policy that the § 922(g) federal firearms disability should not apply to those individuals who are deemed by their own states, notwithstanding a criminal conviction, to be trustworthy enough to possess firearms and otherwise to be entitled to participate as full members of the law-abiding community.

The court below held that some convicted misdemeanants, in states such as Wisconsin which do not take away any civil rights or restrict the possession of firearms for such offenses, are forever barred by § 922(g) from possessing a firearm even though felons in those states are not. A survey of the varied consequences of criminal convictions in the 50 states and the District of Columbia which is elaborated in this Brief shows the decision of the court below to be not only contrary to Congressional intent but also absurd in its application. Accordingly, *amici* urge the Court to hold that any judgment in a criminal case that does not result under local law in the loss of civil rights or eligibility to possess firearms is simply not a disqualifying "conviction" within the meaning of the federal gun control laws.

As originally enacted in 1968 and until 1986, Section 921(a)(20) excluded from the definition of "crime punishable by imprisonment for a term exceeding one year," *inter alia*, non-firearm offenses under state law that were "classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20) (1968). In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), this Court addressed whether a guilty plea

which had been "expunged" under state law (pursuant to statutory provisions that provided for such expunction upon completion of a probationary term, following a deferral of a formal judgment), nevertheless generated a "conviction" under Section 922(g), such that a corporation's license as a firearms dealer could be revoked because the former probationer was an officer of the company. *Id.* at 107-10. Following its earlier decision in *Lewis v. United States*, 445 U.S. 55, 60 (1980) (defendant's conviction was disqualifying under federal law even though subject to collateral attack on constitutional grounds), the *Dickerson* Court held that the defendant officer had been "convicted," within the meaning of Section 922(g), upon notation of his guilty plea and imposition of the probationary term even though no judgment had entered and state law viewed the conviction, if any, to have been nullified. *Id.* at 113-14 & n.9. The Court noted that "expunction under state law does not alter the historical fact of the conviction." *Id.* at 115. Based on the premise that "whether one has been 'convicted' within the language of the gun control statutes is necessarily ... a question of federal, not state law," *id.* at 111-12, the Court declared that "expunction of a state conviction was not intended by Congress automatically to remove the federal firearms disability." *Id.* at 115.

In so holding, the Court noted that "a rule that would give effect to expunctions under varying state statutes would seriously hamper effective enforcement" of gun-control laws because expungement statutes in those states that had enacted such laws "differ ... in almost every particular." *Id.* at 121. The Court recognized that Congress, in enacting the 1968 statutes, "took pains to avoid those very problems ... such as individualized federal treatment of every expunction law," by "us[ing] unambiguous language in attaching gun control disabilities to

any person 'who has been convicted' of a qualifying offense." *Id.* at 122.[2]

Section 921(a)(20) was amended in the Firearms Owners' Protection Act (FOPA) of 1986. P.L. 99-308, 100 Stat. 449, 450 (1986). The current version of Section 921(a)(20) retains the original limiting definition of "crime punishable by imprisonment for a term exceeding one year," *i.e.*, excluding "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less," but added a choice-of-law clause which, in response to *Dickerson*, provides that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."[3] In a second added clause, Congress further limited the scope of what will be treated as a "conviction" under § 922(g) by deferring to the states' remedial mechanisms:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms.

18 U.S.C. § 921(a)(20). The scope of these exemptions is broad, as revealed in the obviously intended overlapping categories. Under this provision, a person whose civil rights have been

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[2] In this Brief, *amici* use the words "expunction" and "expungement" interchangeably, as this Court has done in its opinions. The latter term is found in most of the pertinent statutes and in more recent court decisions.

[3] *See Beecham v. United States*, 511 U.S. 368, 374 (1994) ("in enacting the choice-of-law clause, legislators may have been simply responding to our decision" in *Dickerson*).

"restored" by the state enjoys a removal of the federal firearm disqualification, unless the state expressly provides otherwise, whether or not the conviction in question has also been set aside, expunged or pardoned. Likewise, subject to the "unless" clause, the federal disqualification is also removed (because the person is no longer considered to have been "convicted") if the person has been pardoned or the conviction as been "expunged" or "set aside" under state law, even if some or all civil rights are *not* "restored." Similarly, a conviction that has been "set aside" no longer counts, even if the record has not been expunged, and an expunction of the conviction that does not involve setting it aside will also presumptively suffice. The court below relied on a strict reading of the word "restored" in this provision to justify the conclusion that otherwise covered convictions for which neither civil rights nor eligibility to possess a firearm was ever removed were nonetheless intended to be disqualifying. That conclusion is both illogical and incorrect.

The FOPA amendment to Section 921(a)(20) was intended to define a disqualifying conviction by reference to the law of the jurisdiction of conviction. The Senate first considered amending the statute as early as 1982, even before *Dickerson*:

> A third change relates to the definition of "crime punishable by imprisonment for a term exceeding one year," a conviction for which bars a citizen from possessing firearms. The first is a recognition that what constitutes a conviction shall be determined in accord with the law of the jurisdiction where the underlying proceeding[s] were held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period, or which create "open-ended" offenses, a conviction for which may be treated as misdemeanor or felony at the option of the court. Since the federal

> prohibition is keyed to the state's conviction, state law should govern in these matters. . . .
>
> [The bill] would also exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision as to pardons . . . relating to possession of firearms, but through oversight does not include such provision in 18 U.S.C. section 922, dealing with their purchase or receipt. This oversight has resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision that he may possess it. *Thrall v. Wolfe,* 503 F.2d 318 (7th Cir. 1974). This change would remove that anomaly. . . .

Federal Firearms Owners Protection Act, Rep. No. 97-476, to Accompany S. 1030, Comm. on Judiciary, U.S. Senate, 97th Cong. 2d Sess., 18 (1982).

The Senate again took up the issue in 1984, following *Dickerson v. New Banner Institute.* THE FEDERAL FIREARMS OWNERS PROTECTION ACT: HEARINGS BEFORE THE SENATE COMM. ON THE JUDICIARY, 98th Cong. 1st Sess., 14-15, 21 (1984). Once again, the Senate spoke to using state law to define a "conviction." Federal Firearms Owners Protection Act, Sen. Rep. No. 98-583, to Accompany S. 914, 98th Cong., 2d Sess. 7 (1984). The Senate Report noted that the proposed amendment would "render the *Dickerson* decision inapposite where individual State courts or legislatures have decided to the contrary." *Id.* at 7 n.16. As Senator Hatch, the Senate bill's floor manager, explained in 1985, the amendment to Section 921(a)(20), which became law the next year, would grant authority to the state jurisdiction that "prosecuted the individual to determine eligibility for firearm possession." 131 Cong. Rec. S8686 (June 24, 1985).

In *Beecham*, this Court explained that the choice-of-law provision, under which the law of the convicting jurisdiction defines a "conviction," and the "exemption clause," under which a restoration of rights, pardon, expungement, or set-aside undoes a conviction's effect, are indeed related: "we must look to whether Beecham's . . . civil rights were restored under federal law (the law of the jurisdiction in which the earlier proceedings were held). 511 U.S. at 371. "The first sentence and the first clause of the second sentence" of Section 921(a)(20) "define convictions, pardons, expungements, and restoration of civil rights by reference to the law of the convicting jurisdiction." *Caron v. United States*, 524 U.S. 308, 313 (1998) (citing *Beecham*). The exemption clause was intended to give effect to a jurisdiction's decision to relieve a person from the collateral consequences triggered by its conviction. Left within the definition of "conviction" are only those whom the convicting jurisdiction considers insufficiently trustworthy to exercise the rights of citizenship. As this Court has rightly observed, "Congress sought to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society," *Small v. United States*, 544 U.S. 385, 393 (2005) (citation and internal quotations omitted). The FOPA Congress deferred to *state* jurisdictions to determine, in the first instance, whether a citizen's criminal record indeed demonstrates such untrustworthiness.

The express Congressional policy of deference to the states under Section 921(a)(20) has the effect of limiting the cases where a person could be prosecuted in federal court for firearms conduct which the state's parallel law does not prohibit. The statute thus conforms to the general presumption of federal criminal statutory construction that Congress in legislating has not "'significantly changed the federal-state balance' in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000), quoting *United States v. Bass*, 404 U.S. 336, 349 (1971) (discussing firearm possession provision of 1968 Omnibus Crime Control Act); *see also Jones*, 529 U.S. at 859-

60 (Stevens & Thomas, JJ., concurring, emphasizing this point). In this light, a "conviction," under 18 U.S.C. §§ 921, 922 and 924, as they incorporate state law, means – almost by definition, although the structure of subsection 921(a)(20) is not that of a dictionary (or ordinary statutory) definition – a conviction which is, at the time of the questioned gun possession, *disqualifying* under the law of that state. "Given the primacy of state law in the statutory scheme, it is bizarre to hold that the *legal* possession of firearms under state law subjects a person to sentence enhancement under federal law." *Caron*, 524 U.S. at 318 (Thomas, J., dissenting, with Scalia & Souter, JJ.) (original emphasis).

Ignoring the essence of the exemption clause, as informed by the choice-of-law clause, is the primary analytical flaw in the Seventh Circuit's rationale. The problem is not, as the Seventh Circuit put it, whether petitioner Logan was "misled by [a] state act that apparently freed him from the legal consequences of his battery convictions," *United States v. Logan*, 453 F.3d 804, 807 (7th Cir. 2006), but rather that Wisconsin has decided that individuals convicted of misdemeanor battery may lawfully exercise all the civil rights of citizens as well as possess a firearm, even when the punishment for battery can exceed two years of imprisonment. In effect, Wisconsin has chosen that persons such as petitioner Logan *are* sufficiently trustworthy to be allowed to exercise the rights of a citizen. The fact that he may also possess firearms under state law means that he is not excluded by the "unless" clause that follows. *See Caron*. Congress amended § 921(a)(20) in 1986 specifically to delegate that determination as to when a conviction should be disqualifying to the jurisdiction in which a prior conviction was imposed. The federal courts, bowing to the will of Congress, must therefore give controlling effect to the law of Wisconsin.

The statutory-construction canon that guided this Court in *Beecham, i.e.*, that "[t]he plain meaning that we seek to discern is the plain meaning *of the whole statute*, not of isolated

sentences," 511 U.S. at 372 (citations omitted; emphasis added), is fully applicable here as well. Every Member of the Court subscribed in *Caron* to the view that subsection 921(a)(20), even after FOPA, features problematic drafting which raises unanswered questions, and that in attempting to resolve such issues, the Court should presume that Congress did not intend "bizarre" results. *See* 524 U.S. at 315 (majority), 318 (dissent). Petitioner's brief shows that the decision of the court below produces precisely such results. Yet without even addressing the irrational results that follow from the Seventh Circuit's construction of Section 921(a)(20), that court's refusal to apply the choice-of-law and exemption clauses together as Congress plainly intended renders its construction untenable. Because petitioner's misdemeanor battery conviction did not cause him to lose either his civil rights or his firearms rights under Wisconsin law, he has not "been convicted ... of a crime punishable by imprisonment for a term exceeding one year," within the meaning of § 922(g) as explicated and limited by § 921(a)(20).

B. The Seventh Circuit's Application of Section 921(a)(20) in Logan's Case Criminalizes Firearm Possession That Is Lawful Under State Statutes.

In sixteen American jurisdictions, persons convicted of certain felonies, misdemeanors punishable by more than two years, or offenses classified as neither misdemeanors nor felonies, retain their civil rights after conviction. In twelve of these sixteen jurisdictions, those persons also retain the right to possess firearms, and in another, they regain their firearms rights automatically after a waiting period. The governing provisions are set forth in Appendix 1 to this Brief.[4] Under the Seventh

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[4] This and all related discussion in this Amicus Brief is based on detailed research of the 50 states and the District of Columbia undertaken by Sentencing Resource Counsel of the Federal Public and Community Defenders, starting with the invaluable published work of former U.S. (Cont'd)

Circuit's interpretation of Section 921(a)(20), in six of those thirteen jurisdictions, persons convicted of less serious offenses who do not suffer a loss of civil rights and who are not disabled by the state from lawful possession of a firearm, would nonetheless be required to seek some extraordinary relief, which is in fact or law largely unavailable, to satisfy Section 921(a)(20)'s exemption clause, while those convicted of more serious offenses, because they *do* lose civil rights upon conviction, would not. *Logan*, 453 F.3d at 806. In one of those jurisdictions, every person convicted of a crime, including the least culpable offenders whose firearms eligibility is never taken and more serious offenders who can regain firearms rights after the passage of time, would have to seek extraordinary and generally unavailable relief to satisfy the exemption clause, *because* they lose no civil rights. And in six other jurisdictions, less serious offenders who lose no civil or firearms rights would be required to obtain extraordinary relief in order to meet the exemption clause, *on the same footing* with more serious offenders who lose their rights.

Congress is presumed to have known of the surrounding legal landscape. The presumption that "Congress is aware of existing law when it passes legislation," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (citation omitted), is fully applicable where, as here, the Congress adopts (or defers to) state law as part of a federal statutory scheme. *See Goodyear*

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Pardon Attorney Margaret Colgate Love, a leading scholar of post-conviction collateral consequences and remedies. *See* M. LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (Hein 2006), updated at *http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486* (Sentencing Project 2007). The results of this research are presented in a set of four detailed charts, labeled as Appendices 1 through 4 to this Brief, and lodged with the Clerk (due to impossibility of printing them in compliance with Rule 33 while retaining their usefulness) pursuant to Rule 32.

Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988).[5] The absurdity of requiring such individuals, who remain in full possession of their civil rights and gun rights under state law, to seek such relief (assuming it is available in a given state, which is usually not the case, *see* Appendices 1 and 3), while persons convicted of far more serious crimes are, in many jurisdictions, the beneficiaries of *automatic* restorations of civil rights and therefore within the exemption clause, *see* Appendix 2, is too obvious to merit serious consideration as having been within the intendment of Congress.[6]

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[5] In *Goodyear*, the Court addressed a federal statute, 40 U.S.C. § 290, under which state worker compensation laws applied to federal enclaves within a state in the same manner as those laws would apply to private employers in that state, to determine whether enhanced award provisions in certain states would apply in federal enclaves. 486 U.S. at 183-84. Ohio, whose statute was before the Court, as well as other states, provided additional awards to injured workers based on an employer having engaged in specific forms of misconduct and/or violations of identified safety violations. *Id.* at 184. The Court held that the Congress would be deemed to have been aware of such statutory provisions when it enacted the federal statute deferring to state worker compensation laws:

> We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts. In the absence of affirmative evidence in the language or history of the statute, we are unwilling to assume that Congress was ignorant of the substantial number of states providing additional workers' compensation awards when a state safety regulation was violated by the employer. Indeed, Congress appears to have recognized the diversity of workers' compensation schemes when it provided that workers' compensation would be awarded to workers on federal premises "in the same way and to the same extent" as provided by state law. . . .

Id. at 184-85 (citation omitted).

[6] As set forth in Appendix 2, many states have provisions that restore civil rights to most, if not all, convicted persons upon completion (Cont'd)

In enacting Section 921(a)(20), Congress is presumed to have known, and taken into consideration, that Wisconsin – as well as twelve other states and the District of Columbia – authorize more than two years of imprisonment for certain offenses which those states nevertheless classify as "misdemeanors,"[7] and that two states (Maine and New Jersey)

(Cont'd)
of a prison sentence or other criminal sanction, plus, in some instances, an additional waiting period. The Seventh Circuit's reading of Section 921(a)(20) means that persons whom individual states believe should be deprived of their civil rights upon conviction but who obtain automatic, or virtually automatic, restorations of civil rights may invoke the exemption clause of Section 921(a)(20). Persons such as petitioner Logan, on the other hand, who are convicted of offenses that their own state deems *insufficiently* serious to warrant a deprivation of civil rights in the first instance, however, must seek some form of unavailable or highly discretionary relief from the conviction itself in order to attain the benefits of the federal exemption clause.

[7] *See* Colo. Stat. §§18-1.3-501(1), (1.5)(a), 18-1.7(a), (3) (misdemeanor assault in the third degree against police officer, firefighter, or public mental worker subject to 48 month statutory maximum); Colo. Stat. §§ 18-3-412(2), 18-1.3-501(1), (3) (habitual sex offenders against children punishable by mandatory six-year term for misdemeanor conviction on second or subsequent conviction); Conn. Stat. §§ 53a-40a(b), 53a-35a (Class A misdemeanor committed by "persistent offender of crimes involving bigotry and bias" subject to up to five years of imprisonment; Conn. Stat. § 53a-40d(b) (Class A misdemeanor committed by "persistent offender of crimes involving assault, stalking, trespass, threatening, harassment, criminal violation of a protective order or criminal violation of a restraining order" subject to up to five years); D.C. Stat. § 22-404(d) (certain repeat stalking offenses are punishable by up to three years); Fla. Stat. § 775.0845 (1994) (conviction of misdemeanor committed while wearing mask punishable by maximum of five years of imprisonment); Fla. Stat. § 775.085 (1997) (first-degree misdemeanor under "hate crime" statute punishable by maximum of five years); Ind. Code § 35-50-2-10(a)(2), (f) (Class A misdemeanor "habitual substance offender" punishable by additional term of three to eight years); Iowa Stat. § 903.1(1)
(Cont'd)

do not classify crimes as either "misdemeanors" or "felonies."[8] Indeed, it would have made no sense for Congress to include a provision specifically addressing misdemeanors punishable by

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("aggravated" misdemeanor punishable by two years); Iowa Stat. § 901A.2 ("sexually predatory offense" classified as misdemeanor punishable by twice maximum sentence and up to 10 years of imprisonment for offender with two prior convictions); Iowa Stat. § 903B.2 (2006) (revocation of supervision following conviction for certain misdemeanor sex offenses punishable by two years on first revocation and five years on second revocation); La. Rev. Stat. §§ 3:4229(F), 14:40.2(B)(6)(a), 14:40.3(C)(2), (3); 14:56.2(C), 14:95.1.1, 14:125.2; 14:134.1, 40:695(B)(1), 51:2013 (numerous misdemeanor offenses punishable in excess of two years of imprisonment); Md. Code, Criminal Law §§ 3-203, 3-204, 3-605, 3-802, 3-804, 5-620, 6-107, 8-401, 8-516 (numerous misdemeanors punishable by between three and ten years); Mass. Gen. Law 279, § 23 (two and one-half year maximum sentence for misdemeanors); Neb. Rev. Stat. §§ 28-105(1), 28-106(1), 28-111, 28-115(1), 28-323 (certain misdemeanors committed for discriminatory reasons or against pregnant woman punishable by up to five years); N.H. Rev. Stat. § 651:6(III)(b) (with aggravating circumstances, misdemeanors punishable by maximum of five years); 18 Pa. Const. Stat. § 106 (first-degree misdemeanor punishable by maximum of five years); S.C. Code §§ 16-1-20(A), 16-1-100(A) (over 130 misdemeanors subject to three-year maximum term of imprisonment).

[8] 17-A Me. Rev. Stat. §§ 4(1), 1252(1)-(2), (4) (all offenses other than murder classified as Class A, B, C, D or E crimes; Class D and E crimes punishable by imprisonment in county jail only but statutory maximum increased from less than one year and no more than six months respectively to five years and less than one year respectively for offenses committed with dangerous weapon); N.J. Stat. Ann. §§ 2C:1-4, 2C:43-1, 2C-43-6(a), 2C:43-7(a)(4)-(5) (no classification of felonies and misdemeanors, but as first, second, third and fourth degree crimes and "disorderly persons" offenses; fourth-degree crimes punishable by maximum of 18 months but subject to extended term of up to five years based on aggravating factors). Historically, prior to 1979, New Jersey referred to all crimes as "misdemeanors," though more serious offenses were classified as "high misdemeanors."

more than two years of imprisonment if it had not been aware that many jurisdictions allow such sentencing for certain offenses labeled "misdemeanors."

The details of the availability in each state of the remedies mentioned in subsection 921(a)(20)'s exemption clause are elaborated in Appendix 3, disclosing the availability of expungement, set aside and pardon, as defined "by reference to the law of the convicting state." *Caron v. United States,* 524 U.S. 308, 313 (1998). To be included in one of these columns, the mechanism must operate on a "conviction," which likewise is defined "by reference to the law of the convicting state." *Id.*

Expungement of some subset of existing convictions – whether tiny or broad – is available in twenty-six jurisdictions, but is only available for at least some qualifying convictions (as defined in Section 924(e) and not exempt under Section 921(a)(20)(B)) in nine jurisdictions (Arkansas, Kansas, Minnesota, New Hampshire, New Jersey, Ohio, Rhode Island, Utah, Washington). Included in the "Expungement" column of Appendix 3 is any statutory procedure that results in what the state legislature or the state courts call an "expunction" or "expungement" which is available with respect to an existing adult conviction. The category relies on the terminology that the state itself uses rather than the effect of the procedure, because the effect of an "expungement" varies quite widely from state to state. Similarly not included are procedures for "sealing" records or "vacating" convictions for certain purposes that may have an effect similar or even identical to another jurisdiction's expungement procedure, unless the jurisdiction itself calls the procedure an "expunction" or "expungement."[9] Expunction also

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[9] *Compare, e.g., State v. Keyes*, 131 Wash. App. 1042 (Wash. Ct. App. 2006) (Table) (a "washed out" conviction under Wash. Stat. § 9.94A.640 is not an expungement), *review denied*, 149 P.3d 377 (Wash. 2006) *with People v. Acuna*, 92 Cal. Rptr. 2d 224, 226 (Cal. Ct. App. 2000) (a "set aside" conviction under Cal. Penal Code (Cont'd)

may be available only in conjunction with or after a pardon, a state-labeled "set aside," *see* next paragraph, or a civil rights restoration, *see* Appendix 2 ("Mechanisms for Restoring Civil Rights Lost Upon Conviction"). If expungement is available only in conjunction with or after one of these other mechanisms, this fact is so noted, but the remedy then is not, of course, a distinct method of satisfying the exemption clause.

Eleven jurisdictions (Alaska, Arizona, California, Idaho, Kentucky, Louisiana, Michigan, Nebraska, Oregon, Texas, and Washington) have what they call a "set aside" procedure for certain convictions for which judgment has entered and are otherwise valid. These are listed in the "Set Aside" column of Appendix 3.[10] Notably, of the 13 jurisdictions which are affected by the rationale of the decision below only Louisiana and Nebraska even have a "set aside" procedure.

Finally, in Appendix 3, the "Pardon" column is limited to executive pardons which are granted by the Governor or, if the

(Cont'd)

§ 1203.4 is an expungement). Several jurisdictions permit expunction when charges have been dismissed or not prosecuted; when the person was acquitted; when the conviction was erroneous; when the person was adjudicated delinquent; or when the charge was dismissed upon successful completion of probation and judgment never entered. When expungement is available only in one or more of those situations, but not for an existing adult conviction, it is not included in this column of Appendix 3.

[10] Not included on Appendix 3 as "set asides" are procedures for appeal or collateral attack, available in every jurisdiction, which may reverse, vacate or invalidate a conviction. Nevertheless, *amici* are confident that Congress intended convictions "set aside" in that rather different (and more common) sense to be exempt under § 921(a)(20) as well. Likewise, *amici* have omitted from Appendix 3 the numerous remedies in the states, some of them labeled as "expungements" or "set asides," for ameliorating the effects of prior juvenile adjudications. This is not to suggest that these records, once set aside and/or expunged, are not excepted by § 921(a)(20) as well.

law of the jurisdiction so provides, by a board within the executive branch. Not included are executive procedures for restoring civil rights that are not called "pardons." (A separate chart, entitled "Mechanisms for Restoring Civil Rights Lost Upon Conviction," lodged as Appendix 2, sets forth mechanisms for restoration of civil rights other than in conjunction with a pardon, "set aside," or expunction, whether by operation of law or available from a court, the governor or an executive board.) If pardon is not available for some offenders, this fact is noted. For each jurisdiction, it is noted whether pardons are, in practice, reasonably available, infrequent or rarely granted. Pardons are reasonably available in only twelve jurisdictions.

Restoration of civil rights – a separate category under § 921(a)(20) – is defined, like the other exemptions, by reference to the law of the convicting jurisdiction. *See Caron*, 524 U.S. at 313. Several states, including Wisconsin, at issue here, and Iowa, at issue in *Dickerson*, have adopted the common sense view that defendants who do not lose rights need not have them "restored" in order to avoid a state-imposed disability. *See, e.g.*, Wis. Stat. §§ 304.078(2), 973.09(5); Note, 1998 Wisc. Legis. Serv., Act 289 (1997 A.B. 747) (West) ("certificate of discharge" is required as evidence that the "person is restored to his or her civil rights" when a felon, but not a misdemeanant, is discharged from probation, because "persons on probation for misdemeanors do not lose any civil rights, which obviates the need for a discharge document to be filed on their behalf"); Iowa Code §§ 907.3(1), (3), 907.9(4); Op. Atty. Gen. (Wornson), Sept. 10, 1975 (court must recommend to the governor whether or not civil rights should be restored when a person receives a suspended sentence because such a person loses his civil rights, but no restoration of rights is necessary when a person is discharged after a deferred sentence (the procedure at issue in *Dickerson*) because he suffers no loss of civil rights) (on file with *amici*); *Blackmon v. State*, 598 S.E.2d 542, 544-45 & n.13 (Ga. Ct. App. 2004) (a person convicted of a felony pursuant to a *nolo contendere* plea cannot be prosecuted under state felon-

in-possession statute because such a plea does not effect "any civil disqualification of the defendant to hold public office, to vote, to serve upon any jury, or any other civil disqualification imposed upon a person convicted of any offense under the laws of this state") (citing Ga. Code Ann. § 17-7-95(c)); *Martin v. State*, 791 So. 2d 1115, 1116 (Fla. Dist. Ct. App. 2000) (defendant whose prior felony did not cause a loss of civil rights cannot be denied post-trial bail under statute that permits detention only when "civil rights have not been restored" for prior convictions).

The Seventh Circuit's interpretation of § 921(a)(20) would effectively overrule those common sense determinations, because it would require those who do not lose civil rights nonetheless to have them "restored" in order to satisfy the exemption clause. It would also nullify the determination by thirteen jurisdictions – Colorado, Connecticut, the District of Columbia, Florida, Iowa, Louisiana, Maine, Nebraska, New Hampshire, North Dakota, South Dakota, Vermont, and Wisconsin – that certain offenders retain all three civil rights and may possess firearms notwithstanding conviction of a misdemeanor punishable by more than two years, of certain felonies, or of an offense not classified as a felony or a misdemeanor.[11] *See* Appendix 1. Whether characterized as unjust, odd, or patently absurd, there can be no doubt that this result is exactly what Congress intended to avoid when it amended § 921(a)(20) in response to *Dickerson* in 1986.

Take, for example, Wisconsin, the state in which Petitioner was convicted. Prior to February 1, 2003, Wisconsin law increased the statutory maximum for misdemeanors from nine months to three years if committed by a "repeater." *See* Wis. Stat. § 939.62(1)(a) (2001), *amended* by Wis. Act. 109 (S.B. 1), sec. 562 (eff. Feb. 1, 2003). Convictions under the "repeater"

[11] In North Dakota, firearms rights are automatically regained after a waiting period. In the other twelve jurisdictions, firearms rights are not lost. *See* App. 1.

statute thus fell outside of 18 U.S.C. § 921(a)(20)(B), which excludes from the federal definition of "conviction" any offense classified by state law as a misdemeanor if punishable by a term of imprisonment of two years or less.[12] The vast majority of those "repeater" convictions did not, however, result in the loss of any civil rights. To the contrary, the ability to exercise civil rights in Wisconsin can be lost only upon a felony conviction, or a conviction of misdemeanor bribery or misdemeanor violation of public trust. *See* Wis. Const. art. 13, § 3(2) (right to hold office lost by conviction of felony or misdemeanor violation of public trust); Wis. Stat. §§ 6.03(1)(b) (right to vote lost by conviction of felony or misdemeanor bribery), 756.02 (right to serve on jury lost by felony conviction). A misdemeanant is also not prohibited from possessing a firearm under state law. *See* Wis. Stat. § 941.29(1), (2).

Petitioner, who was a misdemeanant sentenced as a "repeater," did not thereby lose any civil or firearm rights. By not removing civil rights or firearms qualification from such persons (except those convicted of bribery or a violation of public trust), the Wisconsin legislature signaled clearly its view of the appropriate consequences of this class of convictions. Under the Seventh Circuit's interpretation of "civil rights restored," however, federal courts would be required to treat Wisconsin misdemeanants as harshly as felons – a result directly at odds with Congressional policy to respect state law.

Even more irrational, misdemeanants in Wisconsin, unlike felons, would have no way, in the real world, to satisfy any part of § 921(a)(20)'s exemption clause under the Seventh Circuit's interpretation. Misdemeanants are not ordinarily considered for pardon, *see* State of Wisconsin Office of the Governor,

[12] Wisconsin amended its "repeater" statute effective February 1, 2003. *See* Wis. Act. 109 (S.B. 1), sec. 562 (eff. Feb. 1, 2003). Since then, no misdemeanor in Wisconsin, including misdemeanor battery, is punishable by a term of imprisonment of more than two years even if committed by a "repeater." *See* Wis. Stat. § 939.62(1)(a).

Application for Executive Clemency at II, Eligibility Rule 1 ("Pardons, commutations and reprieves are available for felonies only, not misdemeanors," which may be waived only if an applicant can "demonstrate that there are extraordinary circumstances showing that you should be eligible to apply even though you seek executive clemency for a misdemeanor").[13] Adult misdemeanants have no expungement remedy, Wis. Stat. § 973.015, and Wisconsin has no procedure to "set aside" a conviction at all.[14] The hyperliteral reading of "civil rights restored" by the Court below thereby establishes a barrier to lawful firearms possession, at odds with state policy, that is harsher for Wisconsin misdemeanants than for felons.

Reading "civil rights restored" to require a ritualistic loss and restoration, as did the Seventh Circuit, leads to patently unfair results in numerous other jurisdictions. As in Wisconsin and Florida (*see* Appendix 1, at 5, 18), more serious offenders in Iowa, Louisiana, North Dakota and South Dakota would be able to satisfy the exemption clause when less serious offenders could not. Each of those jurisdictions restores civil rights automatically or nearly automatically to those who lose civil rights as a result of a conviction. *See* Iowa Executive Order No. 42;[15] La. Const. art. 1, §§ 10(C), 20, art. 4, § 5(E)(1); La. Rev. Stat. §§ 15:572(B)(1), (C), (D); N.D. Cent. Code §§ 12.1-33.01, 12.1-33-03(1); S.D. Codified Laws §§ 24-5-2, 24-15A-7. Naturally, restoration procedures do not exist for less serious offenders (misdemeanants in Iowa and Louisiana, probationers in North and South Dakota) because they lose no civil rights.

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[13] Available at http://www.wi-doc.com/index_adult.htm.

[14] Belying the Seventh Circuit's castigation of petitioner for having not sought expunction or pardon of his misdemeanor conviction, 453 F.3d at 809, such relief was thus not even available to him.

[15] Available at http://www.governor.iowa.gov/administration/docs/vilsack-eo-42.pdf.

See id. Under the Seventh Circuit's interpretation, this means that less serious offenders would have to obtain an expungement, set aside or pardon in order to satisfy the exemption clause, while more serious offenders would not. That result, irrational on its own, is materially unfair in light of the fact that such procedures are in fact and law largely unavailable. In Louisiana, a "set aside" (and possible expungement thereafter) is available only if the court defers imposition of the sentence, and pardons are rarely granted. Appendix 1, at 8, 21. In Iowa, North Dakota and South Dakota, expungement and set aside are not available at all. *Id.* at 6, 13-14, 20, 29-31. In Iowa, pardons are infrequent, in North Dakota they are rarely granted, and in South Dakota, they are granted at best about half the time. *Id.*

Maine chooses not to classify crimes as "felonies" or "misdemeanors." *See* 17-A Me. Rev. Stat. § 4(1). As a result, not even the most minor offenses can fit within § 921(a)(20)(B), which applies only to offenses that are "classified by the laws of the State as a misdemeanor." They cannot fit within the Seventh Circuit's interpretation of the exemption clause either because Maine does not remove civil rights for any conviction. *See* Appendix 3, at 9, 23-24. Under the Seventh Circuit's interpretation, then, no one – including the least culpable offenders for whom firearms rights are never taken and more serious offenders who can regain firearms rights after five years, *see* 15 Me. Rev. Stat. § 393(2) – could satisfy the exemption clause unless they obtained an expungement (nonexistent in the state), a set aside (also unavailable) or a pardon (rare). *See* Appendix 1, at 9, 23-24. Here, again, the result is contrary to state law, and thus inconsistent with congressional intent.

In Vermont, persons sentenced to probation do not lose civil rights or firearms rights, and thus would need to obtain an expungement (unavailable unless the court defers sentencing and "strikes" the conviction, which is possible only in very limited circumstances), a "set aside" (nonexistent) or a pardon

(rarely granted) in order to satisfy the Seventh Circuit's interpretation of § 921(a)(20)'s exemption clause. *See* Appendix 1, at 14, 31-33. Under the Seventh Circuit's interpretation, probationers who lost no rights would be on the same footing with those sentenced to prison, contrary to state law. *Id.* Several other jurisdictions likewise would be forced to expunge, "set aside," or pardon non-disabling convictions in order to ensure that federal courts would give effect to their determinations about which citizens may possess firearms. *See, e.g.*, Appendix 1, at 3-4, 12-13 (Colorado, Connecticut, District of Columbia, Nebraska, and New Hampshire). To require such action flatly contradicts congressional intent, and represents the epitome of absurdity, precluding a strictly literal construction of the statute.

Thus, the state laws of which the Congress is presumed to be aware, particularly those of the thirteen jurisdictions in which, like Wisconsin, a person convicted of a misdemeanor punishable by more than two years, a less serious felony, or a crime not classified as either a misdemeanor or a felony loses neither civil rights nor firearm rights – those jurisdictions to which Section 921(a)(20)(B) directly speaks – both informed and limit Section 921(a)(20)'s cabining of the adopted-state-law definition of a "conviction." Congress *cannot* be deemed to have intended to require such persons to seek expungement or a pardon to invoke the exemption clause, when there is no *disabling* conviction from which they would need to be exempted in the first instance.

Indeed, as part of what the Congress must be presumed to have known in adopting the FOPA amendment to Section 921(a)(20) in 1986, expunction of valid existing adult convictions is available, if at all, in only nine jurisdictions, a "set aside" of such a conviction is available in only eleven jurisdictions, and executive pardons are reasonably available to convicted persons in only twelve states. Appendix 3. While the Congress could have concluded that a person who has been convicted of a *qualifying* crime in a jurisdiction that has

determined the offense of conviction sufficiently serious to warrant depriving the convicted person of firearms rights should obtain such discretionary post-conviction relief as may be available in order to invoke the exemption clause, it is an utterly irrational reading of the statute to impose such onerous, and in many cases, impossible, burdens on individuals who have *not* received disqualifying convictions. Moreover, Congress cannot reasonably be deemed to have intended to burden the Nation's Governors in this novel way, demanding their attention to a flood of otherwise unnecessary pardon applications in relatively minor cases. It is, of course, all the more so when persons convicted of far more serious offenses benefit from automatic, or nearly automatic, civil rights restoration provisions.

Finally, the Seventh Circuit's attempt to justify its reading of Section 921(a)(20) because, in that court's view, "[m]ost states would call the batteries of which Logan was convicted felonies and deprive the offender of civil rights," 453 F.3d at 807, is both factually baseless and practically flawed. It is unfounded because, as the Seventh Circuit itself (correctly) recognized "[t]he 1986 legislation makes the effect of a conviction turn *on state law*." *Id.* at 806-07 (emphasis added). The primacy of each individual state's law is written into the federal statute, and the federal courts are assigned no role of weighing the relative "seriousness" (or lack thereof) of any particular conviction – particularly where, as here, the state, while authorizing a longer term for a misdemeanor than is perhaps authorized in other states (until February 1, 2003, when the term was reduced to two years), has *also* determined that the defendant, upon conviction, should *not* suffer the loss either of *any* civil rights or of the right to possess a firearm. That is the determinative factor under the statute. Otherwise, each federal judge, in determining whether a particular state conviction should be considered under Section 921(a)(20) would be authorized to engage in an *ad hoc* valuation of the relative seriousness of the acts for which the defendant was convicted in state court, which quite obviously

is unacceptable under the terms of this federal statute.[16] The analysis is also practically flawed: Wisconsin's treatment of Logan's offense is well within the mainstream of state laws on battery crimes. Appendix 4.[17]

For all these reasons, in addition to those presented by petitioner himself and by his other amici, petitioner Logan was not, on account of his prior record as a misdemeanant in Wisconsin, a person who stood "convicted" within the meaning of the federal firearms law.

CONCLUSION

Fundamental statutory construction rules, *i.e.*, that statutes are to be construed as a whole and that the Congress is presumed to know the law when it enacts a statute, dictate the resolution of the present dispute over a federal statute's meaning and

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[16] Indeed, that the 1986 amendment to § 921(a)(20) was intended to overrule *Dickerson* itself should bar the inquiry suggested by the Seventh Circuit's opinion. As noted at the outset of this brief, the *Dickerson* holding allowed a state offense to be treated as a prior conviction despite a state expunction — that is, despite a state determination that the defendant should not stand convicted of a qualifying offense under Section 921(a)(20). The Seventh Circuit's post-amendment evaluation of Logan's conviction superimposes a *federal* analysis on a state's treatment of state criminal offenses and convictions.

[17] As of the date of this Brief, the batteries of which petitioner Logan was convicted would be classified as misdemeanors in 48 jurisdictions (including Wisconsin). *See* Appendix 4. In 45 of those (including Wisconsin), the offense would not be punishable by more than two years' imprisonment and would thus be excluded under 18 U.S.C. § 921(a)(20)(B). *Id.* In addition to Wisconsin (at the time of Logan's conviction but not today), three jurisdictions (Connecticut, Maryland and Massachusetts) designate a third conviction of simple battery as a misdemeanor with a statutory maximum of more than two years. *Id.* Only in Florida, North Carolina, and South Dakota would a fourth conviction of simple battery constitute a felony. *Id.*

application. The Seventh Circuit itself admitted that its construction of Section 921(a)(20) allows for "disparate treatment," if not downright irrational results, but refused to invoke the prohibition on absurd statutory constructions, viewing it as only a "poorly conceived statute." 453 F.3d at 806, 809. *Amici* NACDL and FAMM ask neither that the Court rewrite the statute nor that the Court substitute its judgment for that of the Congress. Rather, they ask that the Court apply ordinary tools of statutory construction, together with an understanding of the laws that the Congress is deemed to have taken into consideration, to determine that the Congress intended Section 921(a)(20) to respect and safeguard state laws that determine whether convicted persons should be deprived of eligibility to possess a firearm. Respect for those laws requires rejection of the Seventh Circuit's interpretation of the federal firearms statute.

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No. 06-6911

IN THE

Supreme Court of the United States

JAMES D. LOGAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "civil rights restored" provision of 18 U.S.C. § 921(a)(20) applies to a conviction for which a defendant was not deprived of his civil rights thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1)?

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98th Cong., 2d Sess. (1984) 17, 18, 19, 20, 21

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871.[1] NRA has four million individual members and 10,700 affiliated members (clubs and associations) nationwide. Among its purposes, as set forth in its Bylaws, are:

> 1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;
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> 2. To promote public safety, law and order, and the national defense;
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> 3. To train members of law enforcement agencies, the armed forces, the militia, and people of good repute in marksmanship and in the safe handling and

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[1] No counsel for any party to this case authored this brief in whole or in part and no person or entity other than the *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

efficient use of small arms . . . .

NRA represents its members' interests regarding the interpretation of federal statutes which determine eligibility for the lawful receipt and possession of firearms. While this case arises in a sentencing context, the same definition in 18 U.S.C. § 921(a)(20) applies to whether a person may lawfully transfer a firearm to another person, and whether that other person may lawfully receive or possess a firearm. It also applies to whether a person is eligible to have a federal firearms license.

The NRA regularly files briefs in cases in which it is a litigant or an amicus curiae. NRA filed an amicus curiae brief in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), which refused to recognize the disposition of criminal charges under State law for purposes of 18 U.S.C. § 921(a)(20), the provision at issue here. NRA participated in the legislative process leading to the enactment of the Firearms Owners' Protection Act of 1986 ("FOPA"), which revised § 921(a)(20) and overruled *Dickerson*. This Court would benefit from NRA's perspective in this case.

SUMMARY OF ARGUMENT

A conviction may entail taking away one or more of three civil rights – the rights to vote, run for office, and serve on a jury – or it may not entail taking away any of them. An offender who "has had civil rights restored" under 18 U.S.C. § 921(a)(20) is one who currently has all three civil rights, regardless of how many (if any) were taken away and returned.

A person convicted of a more serious crime who has all three civil rights taken away and has them returned is not subject to mandatory sentencing or the prohibition on firearm possession. A person convicted of a less serious crime who

does not lose any civil rights should be considered as having civil rights restored and should not be subject to mandatory sentencing or the prohibition on firearm possession.

FOPA enacted Findings indicating Congress' understanding that law-abiding citizens have a right to keep and bear arms. The Act's prohibitions and exceptions should be interpreted with this purpose in mind. The civil-rights-restoration provision reflects that an ex-offender currently has the rights to vote, run for office, and serve on a jury, thus is considered to be a law-abiding citizen, and should not be subject to a lifetime prohibition on firearms ownership.

It is irrational to allow persons with more serious criminal records to avoid mandatory minimum incarcerations and to possess firearms, but to subject persons with less serious records to the mandatory minimums and to the prohibition on firearm possession. The provision should be construed to avoid this difficult constitutional question under the equal protection component of the due process clause of the Fifth Amendment.

The legislative history of FOPA demonstrates an expansive meaning of restoration of civil rights. Congress intended that, where State convictions are the predicate for federal deprivation of gun ownership, State law should also prevail when it mandates that certain convictions are not sufficiently serious to deprive persons of gun ownership. Eligibility for firearms possession is based on whether one has his or her full civil rights and is not prohibited from firearm possession under State law.

Section 921(a)(20) contrasts with § 921(a)(33)(A), which defines "misdemeanor crime of domestic violence" to exclude a person who "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights

under such an offense) . . . ." The parenthetical would be unnecessary if "civil rights restored" necessarily requires that the applicable jurisdiction provide for the loss of civil rights.

The government has not been consistent in its interpretation of the word "restore." It has argued that an item may be "readily restored" to being a certain type of firearm where it has never previously been such. That violates the rule that criminal statutes must be construed narrowly against the government. That same rule applies here given that one would not be on notice that a person convicted of a serious crime may have civil rights restored and may possess firearms, but a person convicted of a minor crime could never have civil rights restored and may not possess firearms.

ARGUMENT

I. A PERSON WHO "HAS HAD CIVIL RIGHTS RESTORED" IS A PERSON WHO HAS ALL CIVIL RIGHTS, REGARDLESS OF HOW MANY (IF ANY) WERE TAKEN AWAY AND RETURNED

A conviction may entail taking away one or more of three civil rights – the rights to vote, run for office, and serve on a jury – or it may not entail taking away any of them. An offender who "has had civil rights restored" under 18 U.S.C. § 921(a)(20) is one who currently has all three civil rights, regardless of how many (if any) were taken away and returned.

The Firearms Owners' Protection Act ("FOPA"), § 102, P.L. 99-308, 100 Stat. 449, 449-50 (1986), amended § 921(a)(20) to provide the following definition:

> The term "crime punishable by imprisonment for a term exceeding one year"

> does not include –
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

A person who has been convicted of a "crime punishable by imprisonment for a term exceeding one year" and who possesses a firearm is subject to ten years imprisonment.[2] A person indicted for such crime who receives

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[2]*See* 18 U.S.C. § 922(g)(1) (unlawful to possess or receive firearm); § 922(d)(1) (unlawful knowingly to transfer firearm to such person); § 924(a)(2) (ten years imprisonment for knowing violation of § 922(d), (g)).

a firearm is subject to five years imprisonment.[3] A person who is so convicted and has three defined predicate offenses is subject to mandatory imprisonment of fifteen years.[4] Such conviction also precludes a person from being eligible to obtain a federal firearms license or to continue in a licensed firearms business.[5]

The last two sentences of § 921(a)(20) may be referred to as the "choice-of-law clause" and the "exemption clause" respectively. *Beecham v. United States*, 511 U.S. 368, 369 (1994). The term "civil rights" in the exemption clause means the rights to vote, serve on a jury, and run for office.[6] Some

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[3]§ 922(n) (unlawful to receive firearm); § 924(a)(1)(D) (five years imprisonment for willful violation of "any other provision of this chapter").

[4]§ 924(e)(1) (mandatory sentencing for "a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony"); § 924(e)(2)(B) (defining "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" and certain other elements).

[5]§ 923(d)(1) (license shall be approved if person is not prohibited from receipt of firearm under § 922(g), (n)). *See also* § 925(b) (licensee indicted for crime punishable by imprisonment for a term exceeding one year may continue in business until conviction final).

[6]The right to possess arms has also been seen as a civil right, but the "unless clause" at the end of § 921(a)(20) specifically addresses whether a jurisdiction forbids a previously-convicted person to possess firearms. *See Cummings v. Missouri*, 71 U.S. 277, 321 (1867) (French penal code deprived persons of "civil rights," such as "the right of voting, of eligibility of office, . . . of bearing arms"); *Spencer v. Kemna*, 523 U.S. 1, 22 (1998) (Stevens, J., dissenting) (criminal conviction entails "loss of the right to vote or to bear arms"); *United States v. Sharp*, 12 F.3d 605, 608 (6th Cir. 1993) (conviction "deprive[s] an American citizen of civil rights as important as the right to vote, the right to keep and bear arms").

courts initially held that "civil rights must be restored by an affirmative act of a Government official," while others held that "they may be restored automatically by operation of law." *Id.* at 373 n.*, citing *United States v. Ramos*, 961 F.2d 1003, 1008 (1st Cir.), *cert. denied*, 506 U.S. 934 (1992) (former view),[7] and *United States v. Hall*, 20 F.3d 1066 (10th Cir. 1994) (latter view).

While it is now settled that either method suffices, the issue before this Court was already seething in the above cases. As stated in *Hall*, 20 F.3d at 1069:

> the *Ramos* interpretation, though plausible, produces results so unusual that if Congress had intended them it likely would (and easily could) have been more explicit. See *Thomas*, 991 F.2d at 212[8] (noting that under *Ramos* a person who never lost his civil rights is convicted under § 922(g), while a person convicted of a more serious offense and stripped of his civil rights is immunized from § 922(g) so long as his rights were affirmatively "restored") . . . .

Ramos' response was that the more serious offender had civil rights restored via an individualized decision, while the less serious offender did not, since his civil rights had not been taken away. 961 F.2d at 1009. But the first precedent to hold that civil rights may be restored by operation of law – *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990) – stated:

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[7] *Ramos* was overruled in *United States v. Caron*, 77 F.3d 1, 5-6 (1st Cir.) (*en banc*), *cert. denied*, 518 U.S. 1027 (1996), which held that civil rights may be restored by operation of law.

[8] *United States v. Thomas*, 991 F.2d 206, 212 (5th Cir.), *cert. denied*, 510 U.S. 1014 (1993).

"There is no rational basis . . . for distinguishing between civil rights possessed by a felon after his release that were not expressly taken away, and those civil rights which were negated, by statute or otherwise, upon conviction or incarceration and then reinstated after his release." *Id.* at 549 n.13.

However, *McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995), held that rights never taken away cannot be "restored." That was followed by *United States v. Indelicato*, 97 F.3d 627, 631 (1st Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997), holding that "that [defendant's] civil rights, to the extent that they were never taken away, should be treated as 'restored' for purposes of the federal statute." The case before this Court, *United States v. Logan*, 453 F.3d 804 (7th Cir. 2006), agreed with *McGrath*.

For the reasons set forth below, a conviction "for which a person . . . has had civil rights restored" should be read to include the situations where: (1) all three civil rights have been taken away and returned, (2) only one or two civil rights have been taken away and each civil right taken away has been returned, and (3) no civil rights were taken away and the person currently has all civil rights.

To be consistent, the government's position presumably is that all three civil rights must be taken away for a person to have "civil rights restored." If only two civil rights are taken away and then given back, the third civil right was not taken away and thus that one civil right has not been "restored." Or if only one civil right is taken away and then given back, only one civil right has been restored, and the other two are not. Indeed, since "civil rights" is plural, the government's logical position should be that restoration of only one "civil right" (singular) does not restore "civil rights" (plural). Yet such

non-contextual literalism creates nonsensical results.

The government has apparently agreed that one of the civil rights need not be taken away for a person to have "had civil rights restored." *See Caron v. United States*, 524 U.S. 308, 313 (1998) ("Aside from the unless clause, the parties agree Massachusetts law has restored petitioner's civil rights."). In that case the right to vote had not been taken away. *Caron*, 77 F.3d at 6.[9] Thus, where one civil right was not taken away and two were, or two civil rights were not taken away and one was, and the offender ends up having all three, the person is considered as having "civil rights restored." The underlying premise is that "civil rights restored" means, to the extent any civil rights were taken away, they must all be returned. If no civil rights were taken away, the person "has had civil rights restored" for purposes of § 921(a)(20).

By prohibiting possession of one type of firearm, "The State has singled out the offender as more dangerous than law-abiding citizens . . . ." *Caron*, 524 U.S. at 315. The State has done the same when it takes away civil rights for more dangerous crimes, and does not do so for less serious crimes. "Although either reading creates incongruities, petitioner's approach yields results contrary to a likely, and rational, congressional policy." *Id.* That applies here, where the government's position rewards persons convicted of more serious crimes and punishes those convicted of less serious

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[9]The First Circuit *en banc* noted in *Caron*: "We leave till another day the question whether, when *one* civil right is restored but two were never taken away, the same answer would prevail, together with the basic question whether the literal application of 'restore' to a case where no civil rights were taken away is so lacking in sense as to command the same result." *Id.*

crimes.[10] "Congress cannot have intended this bizarre result." *Id.* As *Caron* further explained:

> Congress responded to our ruling in *Dickerson* by providing that the law of the State of conviction, not federal law, determines the restoration of civil rights as a rule. . . . Restoration of the right to vote, the right to hold office, and the right to sit on a jury turns on so many complexities and nuances that state law is the most convenient source for definition.

Id. at 316.

"Most words have different shades of meaning and consequently may be variously construed . . . ." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). The question is "how Congress could have envisioned" a provision "actually working" if applied expansively, and avoiding "strange and indeterminate results." *Nixon v. Missouri Municipal League*, 541 U.S. 125, 126 (2004). *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), notes:

> The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if

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[10]The absurd results under the government's position may be exemplified as follows. Defendant A is convicted of the felony of malicious wounding, he loses civil rights, and thus can have them restored. Defendant B is convicted of the lesser-included offense of misdemeanor assault (punishable by more than two years), he loses no civil rights, and thus cannot have them restored.

possible, all parts into an harmonious whole . . . . ." (Citations omitted).

"A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." *United States v. Ryan*, 284 U.S. 167, 175 (1931).

The legislative purpose is also exhibited elsewhere in the statute. FOPA, § 105, 100 Stat. 459, amended § 925(c) to provide that the Secretary of the Treasury (now the Attorney General) may grant relief from disabilities to a person prohibited from firearm possession based on a finding that "that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[11]

Similarly, the premise of § 921(a)(20) is that a person in possession of full civil rights is not likely to act in a manner dangerous to public safety and that possession of a firearm by such person would not be contrary to the public interest unless the jurisdiction in question forbids such possession.

To be sure, "people in some jurisdictions would have options open to them that people in other jurisdictions may lack." *Beecham*, 511 U.S. at 373. However, *Beecham* did not address the issue here, i.e., how to read the restoration provision as applied to persons within the *same* jurisdiction.

Rejecting a non-contextual literalism, this Court has held that the term "any conviction" in § 921(a)(20) excludes foreign convictions. *Small v. United States*, 544 U.S. 385, 388

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[11]In recent years, there has been an annual appropriations rider prohibiting ATF from processing petitions to remove disabilities under § 925(c). *United States v. Bean*, 537 U.S. 71, 74-75 (2002). This does not reflect on the intent of the earlier Congress that passed FOPA.

(2005) ("The word 'any' considered alone cannot answer this question."). *Small* sought to avoid "an apparently senseless distinction" in coverage based on different jurisdictions. *Id.* at 392.[12] Non-contextual literalism here creates a senseless distinction in the same jurisdiction between less serious crimes (which do not entail loss of civil rights) and more serious crimes (which do).

Small found that "Congress did not consider" the inclusion of foreign convictions, *id.* at 392, particularly in view of "the potential unfairness of preventing those with inapt foreign convictions from possessing guns." *Id.* at 394. Nor did Congress consider here that less serious offenders would be subjected to enhanced sentences and firearms prohibition, but more serious offenders would not.

II. FOPA'S FINDINGS ON "THE RIGHT TO KEEP AND BEAR ARMS" BY "LAW-ABIDING CITIZENS" COUNSELS A BROAD INTERPRETATION OF RESTORATION OF CIVIL RIGHTS

FOPA enacted Findings indicating Congress' understanding that law-abiding citizens have a constitutional right to keep and bear arms. The Act's prohibitions and exceptions should be interpreted with this purpose in mind. The civil-rights-restoration provision reflects that an ex-offender currently has the rights to vote, run for office, and serve on a jury, and thus is considered to be a law-abiding

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[12]In one example, "the language creates another apparently senseless distinction between less serious crimes (misdemeanors punishable by more than one year's imprisonment) committed within the United States (not predicate crimes) and similar offenses committed abroad (predicate crimes)." *Id.*

citizen. Specifically, FOPA, § 1(b), 100 Stat. 449, declared as follows:

> CONGRESSIONAL FINDINGS--The Congress finds that–
>
> (1) the rights of citizens--
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
>
> require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful

purposes."

After declaring "the right[] of citizens . . . to keep and bear arms" under the Second Amendment, Congress qualified that by according that right to "law-abiding citizens." A "law-abiding citizen" is a citizen who the State recognizes as having full civil rights, including the rights to vote, run for office, and to serve on a jury.

If a person convicted of a more serious offense may, as recognized by State law, be considered again a law-abiding citizen and possess a firearm, it is an "undue or unnecessary Federal restriction or burden on law-abiding citizens" to impose a lifetime firearms prohibition on a person convicted of a less serious offense who the State recognizes as sufficiently law-abiding that it does not take away any civil rights. Like the rest of FOPA, § 921(a)(20) should be interpreted as "not intend[ing] to discourage or eliminate the private ownership or use of firearms by law-abiding citizens," who are those the State finds trustworthy enough to vote, run for office, and serve on a jury.

While the meaning of the Second Amendment is in dispute,[13] that issue is not before this Court.[14] This Court should give meaning to and defer to Congress' Findings, read with § 921(a)(20), that firearm possession is a right held by

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[13]*See United States v. Emerson*, 270 F.3d 203, 227-28 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (individual rights view); *accord*, Brief of the United States in Opposition to Certiorari, at 20. *But see Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir.) ("collective rights" view), *reh. denied*, 328 F.3d 567 (9th Cir.), *cert. denied*, 540 U.S. 1046 (2003).

[14]*See Printz v. United States*, 521 U.S. 898, 939 (1997) (Thomas, J., concurring) ("As the parties did not raise this [Second Amendment] argument, however, we need not consider it here.").

those the States consider currently to be law-abiding citizens, i.e., who have full civil rights and who may lawfully possess firearms under State law.

III. THE CLAUSE SHOULD BE INTERPRETED TO AVOID EQUAL PROTECTION PROBLEMS

It is irrational to allow persons with more serious criminal records to avoid mandatory minimum incarcerations and to possess firearms, but to subject persons with less serious records to the mandatory minimums and to the prohibition on firearm possession. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

U.S. Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556 (1986), *dismissing as moot*, 602 F. Supp. 682 (D. N.J. 1985), concerned pre-FOPA law allowing felons, but not persons committed to mental institutions, to petition for relief from firearms disabilities. This Court explained:

> The District Court held that this scheme violated equal protection principles because, in its view, "[t]here is no rational basis for thus singling out mental patients for permanent disabled status, particularly as compared to convicts."

Id. at 559, quoting 602 F. Supp. at 689-90.

FOPA amended the law to allow all persons with disabilities to petition, thereby mooting the case. *Id.* at 559-

60. While this Court thereby did not resolve the issue on the merits, the irrational distinction here also raises difficult equal protection questions. These questions may be avoided by interpreting the statute to treat persons who never lost civil rights no worse than persons who did lose civil rights.[15]

Also analogous here is *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1157-58 (3rd Cir. 1981), which invalidated a state law on equal protection grounds requiring firearm purchasers to be identified by two freeholders, because a state cannot "arbitrarily establish categories of persons who can or cannot buy the weapons."[16]

In sum, this Court should construe "civil rights restored" in a manner so as not to raise questions under the equal protection component of the Fifth Amendment's due process clause.

IV. THE LEGISLATIVE HISTORY DEMONSTRATES AN EXPANSIVE MEANING OF RESTORATION OF CIVIL RIGHTS

FOPA revised the definition in § 921(a)(20) which had been enacted in Title I of the Gun Control Act ("GCA"), P.L. 90-618, 82 Stat. 1213, 1216 (1968). The GCA defined "crime

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[15]"There is no rational basis for allowing a misdemeanant convicted of assault with a deadly weapon to seek relief, while the defendant convicted of simple assault cannot." *In re Evans*, 49 Cal. App. 4th 1263, 1272, 57 Cal. Rptr. 2d 314 (1996).

[16]*See also Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 531-32 (6th Cir. 1998) (invalidating law which allowed some to possess certain firearms and prohibited similarly-situated persons from doing so).

punishable by imprisonment for a term exceeding one year" to exclude antitrust and similar business practices "as the Secretary may by regulation designate," and State misdemeanors "other than one involving a firearm or explosive" punishable by imprisonment for not more than two years.

The most complete analysis of the FOPA revision was set forth in Senate Report 98-583, to Accompany S. 914, 98th Cong., 2d Sess., 7 (1984),[17] which explained:

> The bill makes four changes in this Paragraph. First, it makes the court, rather than the Secretary, the final arbiter as to what constitutes a "similar offense relating to the regulation of business practices." Second, it removes the exception relating to state firearms laws so that state misdemeanors punishable by two years of imprisonment or less would not be disabling crimes under any circumstances.

Under the pre-FOPA version, a class of misdemeanants – those whose convictions involved a firearm or explosive – would be barred from firearms possession for life, while all other misdemeanants could possess firearms. FOPA's drafters saw it as irrational that persons convicted of the same class of

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[17] "There was no Senate Report on Pub.L. No. 99-308. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308." *National Rifle Ass'n v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

There was an earlier Senate report which was worded very similarly to the above report. *See* Senate Report No. 97-476, to Accompany S. 1030, 97th Cong., 2d Sess., 12, 18 (1982) (discussion of § 921(a)(20)), *id.* at 24 (discussion of § 925(c)).

misdemeanors would be treated differently.

Senate Report 98-583 proceeded to explain FOPA's choice-of-law provision as follows:

> Third, it requires that a "conviction" must be determined in accordance with the law of the jurisdiction where the underlying proceeding was held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period, or which create "open-ended" offenses, conviction for which may be treated as misdemeanor or felony at the option of the court. Since the Federal prohibition is keyed to the state's conviction, state law should govern in these matters. In the case of "open-ended" offenses which are classed as felonies, but which may be reduced by the trial court, it is intended that these constitute a "crime punishable by imprisonment for a term exceeding one year" unless and until the court enters a decision to treat the offense as a misdemeanor.

Id. at 7.

The above recognized the primacy of State law in determining the nature of the offense and, by implication, who should be trusted to possess a firearm.[18]

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[18] *See People v. Holt*, 37 Cal. 3d 436, 452, 208 Cal. Rptr. 547, 690 P.2d 1207, 1215 (1984) (conviction of a "wobbler" crime is a misdemeanor "for all purposes" if the punishment is other than prison). Such conviction was disabling before FOPA, *McMullen v. United States*, 349 F. Supp. 1348 (C.D. Cal. 1972), but not under FOPA, *United States v. Grant*, 942 F.2d 794 (Table), 1991 WL 165534 (9th Cir. 1991).

Senate Report 98-583 inserted at the end of the above paragraph a footnote, *id.* at 7 n.16, which explained:

> For instance, the Supreme Court, in *Dickerson v. New Banner Institute, Inc.*, 103 S.Ct. 986 (1983), construed this definition to include guilty pleas where no final judgment had been rendered by the Court. S. 914, as reported, would leave such a determination to the states and would render the *Dickerson* decision inapposite where individual State courts or legislatures have decided to the contrary.

Dickerson refused to recognize an expungement under State law, noting also that a separate federal law explicitly excluded pardons, but that § 921(a)(20) did not. *Dickerson*, 460 U.S. at 114-15, 117. That law was 18 U.S.C. App. § 1201 *et seq.*, which was Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 225, 236 (1968), and which FOPA also repealed. Section 1202(a)(1) prohibited possession of a firearm by a person who "has been convicted by a court of the United States or a State or any political subdivision thereof of a felony . . . ." It provided: "'felony' means any offense punishable by imprisonment for a term exceeding one year . . . ." § 1202(c)(2). Section 1203 exempted a person who received a Federal or State pardon which expressly authorized the person to possess a firearm.

Senate Report 98-583 commented on the above in a discussion of the"exemption clause" as follows:

> Finally, S. 914 would exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision with respect to

> pardons in 18 U.S.C. app. 1202, relating to possession of firearms, but through oversight does not include any conforming provision in 18 U.S.C. 922, dealing with their purchase or receipt. This oversight, which resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision in the pardon that he may possess it,[19] would be corrected.

Id. at 7.

Finally, Senate Report 98-583 explained the "unless clause" at the end of § 921(a)(20) as follows:

> In the event that the official granting the pardon, restoration of rights, or expungement of record does not intend that it restore the right to firearm ownership, this provision honors that intent as expressly provided in the order or pardon.[20]

Id. at 7.

In sum, pervading the last two sentences of § 921(a)(20) – the choice-of-law, exemption, and unless clauses – is deference to State law. While the States would differ on how and the extent to which they rendered restorations of rights and the other forms of alleviation in the exemption

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[19]The report here (*id.* at 7, n.17) cited *Thrall v. Wolfe*, 503 F.2d 318 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975).

[20]Although the above speaks of individualized governmental action which exists with pardons, expungements, and some restoration of rights laws, the text of the exemption clause leaves room for restoration of rights by operation of law.

clause, persons within the same States would be treated the same. Considering the purposes of the FOPA reforms, persons who never lost civil rights should not be treated worse than persons who lost civil rights and had them returned.

FOPA broadened § 925(c), the provision for petitioning the Secretary for removal of disabilities, by authorizing all persons with disabilities to file a petition, and repealing the restriction in the 1968 version which limited restoration only to "[a] person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) . . . ." 82 Stat. at 1225.

Senate Report 98-583 explained: "This is intended to provide a 'safety valve' whereby persons whose offenses were technical and nonviolent, or who have subsequently demonstrated their trustworthiness, may obtain relief." *Id.* at 26. The report explained further:

> Present law restricts relief to a relatively narrow category of persons convicted of felonies, i.e., those who have been convicted of crimes punishable by imprisonment for a term exceeding one year, as defined in 18 U.S.C. 921(a)(20), other than those involving the use of a firearm or Federal firearms offenses. This could arbitrarily exclude from relief persons who might otherwise be more trustworthy than those eligible, particularly if they have been convicted of technical or unintentional violations. Section 105(1) of the bill reported by the Committee amends 18 U.S.C. 925(c) to make any person prohibited from firearm or

> ammunition possession, shipment, receipt or transportation eligible to apply for relief. In light of evidence before the Committee that Gun Control Act charges have been abused in the past, with resultant convictions of persons not inclined to engage in any criminal activity, making relief available to such persons is essential. Moreover, the Committee's amendments to 18 U.S.C. 921(a)(20), described in more detail above, will also address the problems that have arisen in this regard by reducing the class of prohibited persons who might need to seek relief under this Subsection.

Thus, FOPA was intended to provide avenues for all classes of convicted persons to seek to overcome their firearms disabilities. As noted above, the 1968 GCA version excluded some persons who were more trustworthy from ever seeking relief, while allowing persons who were less trustworthy to pursue removal of firearms disabilities. Based on this purpose, the Congress that adopted FOPA would not have intended that misdemeanants who never had civil rights taken away could never in their entire lifetimes be considered as having civil rights restored, while felons who had all three civil rights taken away could have full civil rights restored.

The other legislative history of FOPA does not provide as comprehensive an explanation as the above and is sparse on the amendment to § 921(a)(20), indicating that this provision was non-controversial. However, it further points to the conclusion that Congress did not intend that a person who never lost civil rights would have firearms disabilities.

In hearings in 1982 on S. 1030, chief sponsor Senator James McClure explained that "the same rule on pardons,

expungement, and restoration of civil rights would apply to all. 'Conviction' would be as defined by the law of the jurisdiction where the person was charged." *The Firearms Owner Protection Act: Hearings Before the Committee on the Judiciary*, 97th Cong., 1st & 2nd Sess., on S. 1030, Serial No. J-97-87, at 46 (1982).

An NRA witness testified about the lack of a willfulness requirement in the GCA:

> Thus an individual who inadvertently commits a technical infraction is in fact guilty of a federal felony. Numerous individuals have been prosecuted and convicted on this basis – deprived of their civil rights to vote, hold office, and even own firearms (and in this case permanently, since one who is convicted of a violation of the act itself is barred from ever receiving "relief from disability" based on his good reputation and subsequent behavior).

Id. at 78.[21]

The FOPA bill was designated as S. 49 when debated on the Senate floor in 1985. Senator Orrin Hatch, the bill's floor manager, conducted a section-by-section analysis in which he explained:

> The Gun Control Act of 1968 currently bars any person who has been convicted of a felony from possessing a firearm. Federal courts have interpreted this to bar persons from possessing firearms who have had their criminal records expunged, who have been

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[21] *See id.* at 70 (witness convicted of technical GCA felony "had my rights restored as far as voting and holding office").

> pardoned, or who have had their full civil rights restored pursuant to State law.
>
> S. 49 grants authority to the jurisdiction (State) which prosecuted the individual to determine eligibility for firearm possession after a felony conviction or plea of guilty to a felony. This will accommodate State reforms enacted since 1968 which permit dismissal of charges after a plea and successful completion of a probationary period. Since the Federal prohibition is triggered by the States' conviction, the States's law as to what disqualifies an individual from firearms use should govern.

131 Cong. Rec. S8689 (June 24, 1985).[22]

Senator Hatch's commentary is unmistakable – where convicted of a State offense, the State would "determine eligibility for firearm possession," and State law "as to what disqualifies an individual from firearms use should govern."[23]

Given the above, it is inconceivable that Congress intended that persons in possession of full civil rights would be condemned to lifetime firearms disabilities while persons whose civil rights were taken away and given back are not.

There were no hearings or reports on any of the FOPA bills in the House of Representatives. However, the Judiciary

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[22]Senator Bacus asked: "Does placing a felon's stigma on persons who have received a full pardon advance legitimate law enforcement?" *Id.* at. S8700.

[23]*See also id.* at S9128 (July 9, 1985) (remarks of Senator Sasser) ("The same rules on pardon, relief, and expungement apply to all such restrictions.").

Committee reported H.R. 4227, which was seen as the anti-FOPA bill. Sponsored by Rep. Bill Hughes, it would not have changed the definition of § 921(a)(20). *See* House Report No. 99-495, to Accompany H.R. 4332, 99th Cong., 2d Sess., at 34 (1986), reprinted in 1986 U.S.C.C.A.N. 1327.[24]

The House FOPA bill, H.R. 945, came to the floor via a discharge petition. Two days of debate took place on H.R. 4227, known as the Hughes bill, and H.R. 945, know as the Volkmer substitute. *See* 132 Cong. Rec. H 1644 ff. (April 9, 1986), H 1741 ff. (April 10, 1986).

Congressman Harold Volkmer, chief sponsor of H.R. 945, opened the debate, stating that his bill "will truly return constitutional rights to the citizens of this country." 132 Cong. Rec. H1650 (April 9, 1986). "This bill will assure that the civil rights of our 200,000 licensed dealers and 80 million firearms owners and collectors will not be abused." *Id.* at H1651.

Volkmer mentioned the case of William Smith, who an ATF agent persuaded to commit a technical GCA offense, explaining:

> Smith was unlucky, as he wrote, "Now I have no rights, I am a felon." Apart from all else, he could never own a gun again, for under the Gun Control Act a person convicted under the act itself cannot apply for relief from disability to own a gun. No matter how good his record, no matter how unintentional his violation, he is forever barred. Nor was Smith's case an

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[24]The report included an assessment by the Bureau of Alcohol, Tobacco and Firearms which noted that S. 49 "would require the Bureau to examine the peculiar laws of each State to determine whether a person is convicted for Federal purposes." *Id.* at 20.

> isolated one; 31 other small businessmen had been set up in the same series of cases.

Id. at H1652.

Although the above reference was in the context of the amendment to § 925(c), it illustrates the intent of FOPA that trustworthy persons should not be subject to a lifetime firearms ban. FOPA's definition in § 921(a)(20) was not controversial, as there were no direct references to it in the House debates. Given the broad purpose of FOPA to protect what its sponsors described as constitutional and civil rights,[25] a howl of protest would have erupted had it been suggested that civil rights could be considered as restored for felons but not misdemeanants.

At the end of the debate in the House, the Hughes bill, H.R. 4332 was defeated, while the Volkmer substitute, H.R. 945, was passed as the FOPA. When the Volkmer substitute passed, it then became "H.R. 4332, as passed by the House," while "a similar House bill (H.R. 4332) [the Hughes bill] was laid on the table."[26] 132 Cong. Rec. H 1753, 1757 (April 10, 1986).

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[25]*E.g.*, *id.* at H1653 (Rep. Volkmer) ("My legislation is procivil rights for gun owners. My legislation will assure that every gun owner in this country is guaranteed his and her rights provided by the Constitution."); *id.* at H1659 (Rep. Alexander) ("The purpose of this legislation to balance the rights of law-abiding citizens to bear arms against the very real needs of law enforcement officials to fight crime."); *id.* at H1661 (Rep. Vucanovich) (FOPA would "correct the unnecessary burden placed on the law-abiding American citizens who exercise their constitutional right to own a firearm.").

[26]The FOPA bill being renamed H.R. 4227 has caused confusion, such as the reprinting of House Report No. 99-495 under the title "Firearms Owners' Protection Act" in 1986 U.S.C.C.A.N. 1327. That report opposed FOPA.

In sum, the legislative history buttresses the statutory scheme under which a person currently in possession of full civil rights, without regard to which (if any) may have been taken away and returned in the past, is considered as having civil rights restored.

V. THE CONTRASTING LANGUAGE IN § 921(a)(33) DEMONSTRATES THAT CIVIL RIGHTS MAY BE RESTORED UNDER § 921(a)(20) WITHOUT THE PRIOR LOSS OF SUCH CIVIL RIGHTS

In 1996, Congress enacted § 922(g)(9), which made it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, Title VI, § 658(b), 110 Stat. 3009 (Sept. 30, 1996). Section 921(a)(33)(A) defines the term "misdemeanor crime of domestic violence," but paragraph (B)(ii) provides:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

It is noteworthy that Congress saw it necessary after "has had civil rights restored" to insert the parenthetical "(if the law of the applicable jurisdiction provides for the loss of civil

rights under such an offense)." No such phrase exists in § 921(a)(20). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

The parenthetical would have been unnecessary if "civil rights restored" necessarily required that the applicable jurisdiction provided for the loss of civil rights. It serves to exclude the alternative, i.e., a restoration of rights where the law of the applicable jurisdiction *does not* provide for the loss of civil rights for the offense. The framers of § 921(a)(33) apparently were aware that, under existing precedent, a misdemeanant whose civil rights were never taken away was considered as having civil rights restored, or the parenthetical would have been unnecessary.

Indeed, in 1990, the Sixth Circuit had found "no rational basis" between civil rights "that were not expressly taken away," and those that "were negated . . . and then reinstated." *Cassidy*, 899 F.2d at 549 n.13. And in 1993, the Fifth Circuit was "unwilling to pass through the looking glass into such a Wonderland" that would be entailed in "convicting a person under § 922(g) who has never lost his civil rights and who is not prohibited by the state from possessing a gun while simultaneously immunizing from such a conviction one who was stripped of his civil rights, including gun possession, but has subsequently had them affirmatively 'restored.'" *Thomas*, 991 F.2d at 212.

Accordingly, the existence of the parenthetical in § 921(a)(33) indicates that § 921(a)(20) has no such limitation. Under the latter, civil rights may be restored regardless of

whether "the law of the applicable jurisdiction provides for the loss of civil rights under such an offense."

VI. THE GOVERNMENT HAS ARGUED ELSEWHERE THAT "RESTORE" DOES NOT REQUIRE A RETURN TO A PREVIOUS CONDITION

The government has not been consistent in interpreting the meaning of "restore" under the GCA. In seeking to expand the scope of criminal acts, it has argued in another context that "restore" means to create something that did not exist previously. While the strict construction of criminal statutes against the government precludes that reading, the same rule here counsels a broad interpretation of the word.

Title II of the GCA defines some firearms to include weapons which may "be readily restored" to shoot. 26 U.S.C. § 5845(b), (c), (d). Holding that a rifle receiver was not a machinegun receiver, the D.C. Circuit noted:

> One might contend that a new, unaltered receiver never achieved the status of machinegun and therefore cannot be "restored." The Bureau [of Alcohol, Tobacco and Firearms], however, believes that the phrase "readily restored" applies even to weapons that have never been assembled.

F. J. Vollmer Co., Inc. v. Higgins, 23 F.3d 448, 452 n.6 (D.C. Cir. 1994), citing *United States v. Drasen*, 845 F.2d 731, 735-37 (7th Cir.), *cert. denied*, 488 U.S. 909 (1988).

At the government's urging, *Drasen* held that parts never made into rifles could be "readily restored" as rifles. *Id.* *Cf. id.* at 738 (Manion, C.J., dissenting) (this "did not give the defendants fair notice that their conduct was illegal"), citing

United States v. Drasen, 665 F. Supp. 598 (N.D. Ill. 1987). The district court had relied on the meaning of "restore" as "return to a previous condition," and "the presumption in favor of construing criminal statutes against the government." 665 F. Supp. at 603.

In another GCA case, the government sought to read "restored" as meaning "converted," but this was rejected. *Thompson/Center Arms Co. v. United States*, 924 F.2d 1041, 1044 (Fed. Cir. 1991), *aff'd.*, 504 U.S. 505, 518 (1992) (applying rule of lenity). It seems disingenuous to argue that "readily restored" does not require returning to a previous condition, but that "had civil rights restored" does.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A person should be bound only by a literal definition of "readily restored" in the context of the definition of a firearm. But here, a reasonable person would think that civil rights have been "restored" if one or more have been taken away and given back, and also if none of them were taken away.

CONCLUSION

The Court should reverse the decision of the court of appeals.

Respectfully submitted,

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